Supreme Court, U.S.
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No. 04 627

In The
Supreme Court of the United States

DARRICK MARTINEZ,

Petitioner,

v.

ROSIE GARCIA, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's Fifth, Sixth and Fourteenth Amendment rights were violated when the trial court permitted the prosecution to amend the information, after both sides had rested, to allege that the attempted murders charged in Counts I and II of the Information were premeditated and deliberate thereby increasing the exposure on each count from a maximum of nine years to a mandatory sentence of life in prison.

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PETITION FOR WRIT OF CERTIORARI

Petitioner/Appellant, Darrick Martinez, hereby petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision affirming in part the decision of the United States District Court, Central District of California, denying and dismissing his Petition for Writ of Habeas Corpus.

OPINION BELOW

On August 7, 2002, the United States District Court for the Central District of California adopted the report and recommendation of the Magistrate Judge and denied petitioner's petition for writ of habeas corpus. [Appendix D, p. 20: Report and Recommendation; Appendix E, p. 103: Order Adopting the Report and Recommendation; Appendix F, p. 105: Judgment.] On September 25, 2002, the United States District Court, Central District of California granted petitioner's request for a certificate of appealability in part. On December 16, 2002, petitioner's motion to broaden the certificate of appealability was granted in part by the United States Court of Appeals for the Ninth Circuit. On June 10, 2004, the United States Court of Appeals for the Ninth Circuit, in a published opinion, reversed the District Court's denial of petitioner's petition for writ of habeas corpus with respect to petitioner's claim that the trial court's instruction on the doctrine of transferred intent was legally erroneous and lessened the prosecution's burden of proof in violation of the Fifth, Sixth and Fourteenth Amendments. [Appendix B, p. 4.] On the same date, the Ninth Circuit issued an unpublished memorandum judgment affirming the District Court's denial of the petition for writ of habeas corpus on all other

grounds. [Appendix C, p. 17.] Respondent filed a petition for rehearing on June 18, 2004. On August 13, 2004, the United States Court of Appeals for the Ninth Circuit denied respondent's petition for rehearing and issued an amendment to the published opinion filed on June 10, 2004. [Appendix A, p. 3.]

JURISDICTION

The United States District Court for the Central District of California denied Petitioner's petition for writ of habeas corpus on August 7, 2002. [Appendix F.] Pursuant to Title 28 U.S.C. section 2253, subdivision (c), subsection (1), petitioner requested a certificate of appealability in the District Court. The District Court granted petitioner's request in part. Pursuant to Ninth Circuit Rule 27-1, petitioner filed a motion to broaden the certificate of appealability. On December 16, 2002, the Ninth Circuit granted the motion in part. On June 10, 2004, the United States Court of Appeals for the Ninth Circuit issued a published opinion reversing the judgment of the United States District Court in part. [Appendix B, p. 4.] On the same date, the Court issued a memorandum judgment affirming the judgment of the District Court in all other respects. [Appendix C, p. 17.] On August 13, 2004, the court denied respondent's petition for rehearing and request for rehearing en banc, but issued an amendment to the published portion of the opinion which was issued on June 10, 2004. [Appendix A, p. 1.]

The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254, subdivision (1). *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Fifth Amendment of the United States Constitution

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law."

B. The Sixth Amendment of the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . "

C. The Fourteenth Amendment to the United States Constitution

> " . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

An amended information filed April 3, 1998, alleged respectively in Counts I and II that on January 27, 1998, petitioner attempted to murder Peter Anthony Jimenez and Robert Paul Jimenez, Sr., in violation of Penal Code sections 664/187, subdivision (a). It was further alleged that petitioner personally discharged a firearm which

caused great bodily injury to Peter Anthony Jimenez and Robert Paul Jimenez, Sr. within the meaning of Penal Code section 12022.53, subdivisions (d) and (e), subsection (1). (C.T. 47-48.) In Count III, it was alleged that petitioner shot into an inhabited dwelling in violation of Penal Code section 246. (C.T. 48.)

Trial commenced on June 9, 1998 and a defense motion for mistrial was granted on June 15, 1998. (C.T. 64-70.) Trial commenced again on October 1, 1998 in a different department. (C.T. 79.) After both sides rested, the prosecution moved to amend the information to allege that the attempted murders were willful, deliberate and premeditated within the meaning of Penal Code section 664, subdivision (a). The court permitted the amendment over defense objection. (R.T. 464-465.)

A jury found petitioner guilty as charged in the information and further found that the attempted murders in Counts I and II were willful, deliberate and premeditated. The jury further found that petitioner discharged a firearm causing great bodily injury to both victims within the meaning of Penal Code section 12022.53, subdivisions (d) and (e), subsection (1). (C.T. 230-236.) At a bifurcated proceeding, the court found petitioner's prison term prior to be true. (R.T. 560.) The court sentenced petitioner on both Counts I and II to life with the possibility of parole plus 25 years to life for each of the firearm enhancements. On Count III, the court imposed the upper term of seven years plus one year for the prior prison term. Sentences on all counts were ordered to run consecutively. (C.T. 296.)

Petitioner timely appealed his conviction and sentence (Case No. E024675). On March 28, 2000, the California Court of Appeal, Fourth Appellate District, Division Two,

in an unpublished opinion, affirmed petitioner's conviction, but ordered the trial court to strike the prison term prior and modify the abstract of judgment accordingly. Petitioner filed a timely Petition for Review in the California Supreme Court. On July 19, 2000, the California Supreme Court denied the Petition on the merits.

On October 12, 2001, petitioner filed a petition for writ of habeas corpus and memorandum of points and authorities in support of the petition in the United States District Court, Central District of California. On May 17, 2002, after considering the petition, respondent's return and petitioner's traverse, the Magistrate Judge recommended that the petition be denied and dismissed with prejudice. [Appendix D, pgs. 20-102.] On June 6, 2002, petitioner filed objections to the report and recommendation of the Magistrate Judge. On August 7, 2002, the Honorable George H. King issued an order adopting the report and recommendation of the Magistrate Judge and a judgment denying and dismissing the petition with prejudice. On September 13, 2002, petitioner filed his notice of appeal and requested a certificate of appealability. [Appendix E, p. 103; Appendix F, p. 105.] On September 25, 2002, the Honorable George H. King granted petitioner's request for a certificate of appealability in part. On December 16, 2002, the United States Court of Appeals for the Ninth Circuit granted petitioner's motion to broaden the certificate of appealability in part. On June 10, 2004, the United States Court of Appeals for the Ninth Circuit reversed the decision of the United States District Court in part and affirmed the decision in part. [Appendix B, pgs. 4-16; Appendix C, pgs. 17-19.] On August 13, 2004, the Court of Appeals denied respondent's petition for

rehearing, but issued an amendment to the published opinion filed on June 10, 2004. [Appendix A, pgs. 1-3.]

STATEMENT OF FACTS

Prosecution

Peter Anthony Jimenez has known petitioner since they were 12 years old; they have been close friends for over 25 years. (R.T. 66-67.) At the time of the shooting, Peter, who had recently separated from his wife, was staying with his brother, Robert Jimenez, Sr.. Petitioner and his brother, Rocky Martinez, frequented the house and, at times, stayed there. (R.T. 83-85.) Petitioner was present at Robert's Super Bowl party on the Sunday before the shooting. Everyone but Robert's father and stepmother were drinking and Peter and petitioner were using methamphetamine. (R.T. 68-69.) Peter, petitioner, Joseph Cervantes and a friend named Benji, continued to use methamphetamine and stayed around until 3:00 a.m. Monday morning. (R.T. 70.) At some point, there was an argument between petitioner and Benji because petitioner called Benji's girlfriend "a ho." (R.T. 70.) Petitioner and Peter also had an exchange of words; petitioner had been asking him different kinds of questions and Peter told him that if he had a problem to just come out and say it. (R.T. 71.) Petitioner, however, left on good terms. (R.T. 87-89.)

Peter is in the carpet business. He put carpet down on Saturday and on Monday he had to be there early to move the furniture back into place. After working a couple of hours, Peter went to his wife's apartment and talked with her. When he returned to his brother's house at approximately 9:00-9:30 a.m, petitioner and his brother, Rocky

Martinez, and Joseph Cervantes were out in front. (R.T. 72.) They asked Peter whether anyone was trying to kill them because of the altercation after the Super Bowl. (R.T. 72-73.) Peter responded that he did not know what they were talking about. (R.T. 74.) A while later, Robert pulled up to the house and they proceeded to ask him the same question. Robert told them that they should go home and get some sleep. Petitioner and Rocky left, but returned later and told Robert that they had groceries in the freezer that they needed to get. Rocky remained in the car and just stared at Peter, which was not characteristic of Rocky. (R.T. 75.) Petitioner picked up the groceries and both he and Rocky left. (R.T. 74-75.)

On Monday, Peter continued to drink and take methamphetamine. (R.T. 77.) Early Tuesday morning, Peter was still up watching T.V. in the living room when there was a knock on the door. (R.T. 53-54, 62-63, 65, 77-78.) Peter opened the wood door and saw petitioner, who asked him to open the screen door. (R.T. 78-79.) Peter informed him that he was about to go to sleep, but petitioner insisted that he open the door. Originally, Peter told the police that the wood door was open and that, as he lay on the couch, he looked up and saw petitioner standing at the door. (R.T. 106.) Peter noticed that petitioner was trembling and that he had something shiny in his right hand. When he asked petitioner why he was there, petitioner put a gun up to the door and fired. (R.T. 79.) Peter was shot above his right nipple. As Peter turned and ran, he heard more shots and was hit once more in the back, right next to his spine. He fell to his knees and was hit again in the arm. (R.T. 80.) As he reached the phone, he heard about five more shots. (R.T. 81.)

The front porch light was on and there is a sensor light on the corner of the house. He does not remember for sure which of the two lights were on but he could clearly see who was at the door. (R.T. 111.) If the sensor light was on, it would illuminate a large area including the area by the kitchen. (R.T. 112-113.) There are other lights from the Santa Fe Railroad that illuminate the area in front of the house. (R.T. 114.) Petitioner was wearing a black cap, a black jacket and a black shirt the night of the shooting. (R.T. 116.) Peter informed his brother and whoever else was in the kitchen at the moment of the shooting that it was petitioner who was at the door. (R.T. 119.)

Robert Jimenez got out of bed at midnight or a little later and heard the gunshots. He walked to the kitchen and saw his brother lying on the floor holding the telephone. He checked the phone, but it did not work, so he turned to go back to his room to grab his cordless phone, at which point, he was shot in the side of his chest. (R.T. 147-148.) He did not see who shot him. (R.T. 148-149.)

Karen Mary Cervantes, Robert's girlfriend, went to bed about midnight on the night of the shooting. (R.T. 187-189.) Cervantes heard a knock at the door followed by gunshots. (R.T. 190.) Cervantes could hear yelling throughout the whole ordeal; she could not make out the words, but recognized petitioner's voice. (R.T. 191-192.) Petitioner is her cousin, whom she has known all her life, and there is no doubt in her mind that it was his voice that she heard. (R.T. 192.)

Lisa Ann Calderon woke up and found Peter lying on the kitchen floor. (R.T. 202-203.) After the gunshots ended, she walked to the kitchen window, lifted the blinds, looked out, and saw petitioner with a gun in his hand yelling like

a crazy man. (R.T. 205-206.) The lighting condition at the residence was very bright and there is no question in her mind that it was petitioner. (R.T. 207-208.) Calderon insisted that she told her lawyer and a police officer that she lifted the blinds even though she testified differently at a previous hearing. (R.T. 210-212.)

Julie Anne Coar, an identification technician with the San Bernardino police department, arrived at the crime scene between 12:30 and 1:30 a.m.. (R.T. 181-182.) She used her camera flash when taking pictures of the house and does not recall any motion sensor lights being on. (R.T. 183-184.)

Defense

Gunshot residue tests were done on petitioner's hands and sent to the laboratory by San Bernardino Police Detective Robert A. Descaro. The laboratory reported their findings. (R.T. 235.)

Officer Gerald Burguan was involved in the investigation of this case. (R.T. 273-238.) The police responded to the crime scene within five to seven minutes. Fifteen minutes later, petitioner was arrested at his mother's residence, which is a few blocks from the Jimenez residence. (R.T. 238-239, 243-244.)

Petitioner's brother, Rocky Martinez, testified that he arrived at Robert Jimenez's house between 4:00 and 5:00 p.m. Friday of Super Bowl weekend and they partied until Monday morning. (R.T. 249-250.) He and Peter began using methamphetamine on Friday. (R.T. 250.) Peter used more methamphetamine than he did. Peter was still partying when Rocky went to sleep Sunday. (R.T. 273-275.)

Peter used speed continually Saturday through Sunday, snorting it about every three to four hours and smoking it a lot in between. (R.T. 251.) Peter did not get any sleep Saturday night. (R.T. 252.) Petitioner left before midnight and there was no bad blood between him and the Jimenez brothers. (R.T. 253.) On Monday morning, petitioner came to pick Rocky up at the Jimenez residence. (R.T. 253-254.) He did not ask Peter or Robert if anybody was trying to kill him and his brother. (R.T. 254.) They picked up groceries from the Jimenez's freezer between 4:00 and 5:00 p.m. and then returned to their mother's house where they remained until the police came to arrest petitioner between 12 and 1 a.m. the following morning. (R.T. 255.) Petitioner did not leave the house that night. (R.T. 257.) He does not recall what petitioner was wearing but he does not ever wear baseball caps or hats. (R.T. 257.)

Petitioner testified that the Jimenez brothers are like his own brothers and he use to spend a lot of time at their house. (R.T. 286.) On Super Bowl Sunday, he arrived at the Jimenez residence prior to the kickoff and stayed there until about 11:30 p.m. Sunday night. (R.T. 287.) He did not use drugs that weekend, but he did observe his brother and Peter Jimenez smoking and possibly snorting methamphetamine. (R.T. 302-303.) He was friendly with everyone, but his brother and Peter Jimenez were high and acting strange. (R.T. 304-305.) After the game, they sat around making jokes about promiscuous women. (R.T. 290.) Peter and his wife had recently separated and he took everything that was said personally. (R.T. 288-291.) Petitioner left at about midnight. (R.T. 307.)

On Monday, petitioner picked up his brother from the Jimenez residence. At that point, Peter Jimenez approached him and asked him if he knew something about

his wife. (R.T. 288-289.) Petitioner and his brother went to petitioner's home in Fontana where he fed his animals and washed some clothes before going to his mother's place on 7th Street in San Bernardino. (R.T. 293.) They remained at his mother's all evening except for going next door to Carlos Martinez's house just before 12:00 a.m. to see if they could watch HBO with him. (R.T. 292-293, 299.) Carlos was going to bed so they returned to their mother's home. (R.T. 299.) He did not drink on Monday night and was eating a piece of pie when the police arrived. (R.T. 298, 312.) He did not shoot Peter or Robert Jimenez. (R.T. 298.) At the time he was arrested, petitioner was wearing white sneakers, blue docker pants and a navy blue sweatshirt. (R.T. 299-300.)

Petitioner's mother, Ester Sanchez, was taking "catnaps" on the Monday after the Super Bowl when petitioner and his brother came to her residence. (R.T. 392-394.) She was very tired because her other son, Adrian, has a medical condition which requires someone to look after him 24 hours a day. (R.T. 395.) Petitioner and his brother did not leave her residence at any time after they arrived between 4:00 and 5:00 p.m. on Monday, except for the short time that they went next door to Carlos Martinez's house. (R.T. 397, 400-401.)

Carlos Martinez, petitioner's cousin, knows Robert and Peter Jimenez through petitioner. (R.T. 407-408.) He received a phone call sometime after 11:00 p.m or maybe after 12:00 a.m. from his niece Karen Cervantes advising him that petitioner had shot the Jimenez brothers. He informed Karen that petitioner and his brother had just left his house five minutes earlier. (R.T. 408.) Petitioner and his brother had wanted to watch

T.V., as they normally did, but he told them that he was going to sleep. (R.T. 408-409.)

Chris McWhirter participated in arresting petitioner at his mother's residence. Petitioner was wearing a blue sweatshirt and black pants with possibly white tennis shoes with no hat or cap. (R.T. 424-426.) He does not recall petitioner being under the influence. (R.T. 426.)

Terrence McGee M.D., specializes in addiction medicine. (R.T. 335.) Methamphetamine is a central nervous system stimulant. (R.T. 342.) It makes people stay awake, it makes them apprehensive, anxious, restless, it affects their common sense and ability to make good decisions. (R.T. 343.) It is hard to differentiate people on methamphetamine from people who have full blown schizophrenia. (R.T. 345.) A person on methamphetamine, particularly in combination with sleep deprivation, can experience hallucinations. (R.T. 346.) Paranoia is extremely common, one of the major problems which leads to violence. (R.T. 376.) A person who had been up for two or three days, using methamphetamine would have poor perception ability. (R.T. 379.)

Rebuttal

At the time of petitioner's arrest, the hood of the gray truck in front of the Martinez residence was warm to the touch indicating that it had been recently driven. (R.T. 434-436.)

REASON FOR GRANTING REVIEW

IN ORDER TO DETERMINE WHETHER THE TRIAL COURT'S DECISION TO PERMIT THE PROSECUTION TO AMEND THE INFORMATION AFTER BOTH SIDES HAD RESTED TO ALLEGE THAT THE ATTEMPTED MURDERS CHARGED IN COUNTS I AND II WERE PREMEDITATED AND DELIBERATE THEREBY SUBSTANTIALLY INCREASING THE POTENTIAL SENTENCE VIOLATED PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

An amended information filed April 3, 1998, alleged respectively in Counts I and II that on January 27, 1998, petitioner attempted to murder Peter Anthony Jimenez and Robert Paul Jimenez, Sr., in violation of Penal Code sections 664/187, subdivision (a). (C.T. 47-48.) After both sides rested, the prosecution, over the objection of defense counsel, asked for leave to amend the information to allege that the attempted murders in Counts I and II were willful, deliberate and premeditated within the meaning of Penal Code section 664, subdivision (a). (R.T. 464.) Although attempts to commit crimes for which the maximum sentence is life imprisonment are normally punishable by a determinate term of five, seven or nine years,[1] a sentence of life imprisonment is triggered in the context of an attempted offense when "the crime attempted is willful, deliberate, and premeditated murder." Cal. Pen. Code § 664 subd. (a). Penal Code section 664 clearly states that "[t]he additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted

[1] California Penal Code section 664 subdivision (a).

murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found true by the trier of fact." Cal. Pen. Code § 664 subd. (a). This language was not included within the initial information. Nonetheless, the prosecution's motion to amend the information to include the premeditated and deliberate element was granted over defense objection that it was untimely and prejudicial. (R.T. 465-466.) The trial court's decision to permit an amendment to the information after both sides had rested to allege a more serious offense carrying a mandatory life sentence deprived petitioner of his Fifth, Sixth and Fourteenth Amendment right to notice of the charges against him, a fair trial, the right to present a defense and to due process of law. Reversal of the premeditated and deliberate allegations is required.

The United States Court of Appeals for the Ninth Circuit rejected petitioner's contention, agreed with the Report and Recommendation of Magistrate Judge, and concluded that petitioner "failed to establish that the state appellate court's decision to permit the amendment of the indictment [sic] was contrary to or an unreasonable applicable of clearly established United States Supreme Court precedent." [Appendix C, pgs. 17-18.] Further, the Court of Appeals found that petitioner's reliance on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 67 (2000) was misplaced because "*Apprendi* did not directly address the issue of notice to the defendant of the criminal charges and is therefore not controlling." [Appendix C, p. 18.] The conclusion of the Court of Appeals is incorrect. *Apprendi* and its progeny support petitioner's claim that the amendment to the information after both sides had rested to allege that the attempted murders charged in Counts I and II were premeditated

and deliberate violated petitioner's Fifth, Sixth and Fourteenth Amendment rights. The amendment to the information not only added an element not alleged in the initial information, but substantially increased petitioner's exposure. The California courts' decisions were contrary to clearly established law of this Court. Accordingly, habeas relief was warranted.

No principal of procedural due process is more clearly established than notice of the specific charge and the chance to be heard in a trial of the issues raised by that charge. *Cole v. State of Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A defendant may not be tried on charges that are not made against him in the indictment. See, *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887).

Consistent with this principal, decisions in this Court from as early as 1877 recognize that an accused must be informed of the allegations against him. In *United States v. Simmons,* 96 U.S. 360, 24 L.Ed. 819 (1877), this Court stated, "[F]undamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defen[s]e, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective. . . . " This Court in *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), followed *Simmons* and added, "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, so long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute

the offense intended to be punished." "Procedural requirements are essential constitutional safeguards in our system of criminal law. These safeguards should constantly and vigilantly be observed to afford those accused of a crime every fair opportunity to defend themselves." *Paterno v. Lyons*, 334 U.S. 314, 68 S.Ct. 1044, 1048, 92 L.Ed. 1409 (1948).

More recently, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 67 (2000), this Court reaffirmed its holding in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) and noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantee of the Sixth Amendment, any fact (other than a prior conviction) that increases that maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, *supra*, 120 S.Ct. at 2362-2363. This Court concluded that the Fourteenth Amendment commands the same answer in cases, such as the instant one, which involve a state statute. *Id.* at 120 S.Ct. 2355. This Court in *Apprendi* clarified, "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offense, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances with certainty and precision." *Id.* at 120 S.Ct. 2356. This Court in *Apprendi* concluded that other than the fact of a prior conviction, any fact which increases the penalty beyond the proscribed statutory maximum must be set forth in the charging document, submitted to the jury and proven beyond a reasonable doubt. *Id.* at 120 S.Ct. at 2362-2363.

Contrary to the finding of the Court of Appeals, the language in *Apprendi* regarding the Fifth, Sixth and Fourteenth Amendment right to notice of the charges was not simply dicta and thus, is controlling on the issue presented in the instant petition. As noted by the Magistrate Judge in his Report and Recommendation which was adopted by the District Court and affirmed by the Court of Appeals, the Ninth Circuit Court of Appeals in *Jones v. Smith*, 231 F.3d 1227, 1235 (9th Cir. 2000), found that *Apprendi* applies to the contents of a state court information and unlike the Magistrate Judge in this case, did not find that the reference to the state charging document was merely dicta. Pursuant to *Apprendi v. New Jersey, supra,* 530 U.S. 466, the deliberate and premeditated allegation should have been alleged in the information. Furthermore, even if this language in *Apprendi* did not create "firmly established" precedent, the aforementioned cases which proceeded this Court's decision in *Apprendi* support petitioner's claim and constitute firmly established precedent of this Court requiring habeas relief. Failure to include the allegation in the information resulted in a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights and left him unable to properly defend himself against the premeditation allegation in violation of his Sixth and Fourteenth Amendment rights. The Court of Appeals' conclusion to the contrary is misplaced and contrary to decisions by this Court.

In the instant case, the information failed to allege that the attempted murders were done with premeditation and deliberation. Therefore, petitioner had no notice that he would need to defend against such allegations. The trial court, however, permitted the prosecution to amend the information, after both sides had rested, to allege that the

attempted murders were premeditated and deliberate. Since the court permitted the prosecution to amend the information after both sides had rested, petitioner was unable to properly defend himself against the premeditation allegation in violation of his federal constitutional rights. The jury, therefore, found that petitioner acted with premeditation and deliberation. Permitting the prosecution to amend the information to allege a more serious offense after both sides had rested, thereby precluding petitioner from challenging the allegation, deprived him of his Fifth, Sixth and Fourteenth Amendment rights.

Contrary to the finding of the state courts and the District Court, the error in the instant case requires reversal per se. This Court has classified most constitutional errors in two categories: trial-type errors and structural errors. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). A trial-type error is an error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 499 U.S. at 307-308; see also, *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). On the other hand, structural defects affect the framework within which the trial proceeds and affects the entire conduct of trial from the beginning to the end and defies analysis by harmless-error standards. *Arizona v. Fulminante*, *supra*, 499 U.S. at 310-311. In *Sullivan v. Louisiana*, *supra*, 508 U.S. at 281, the United States Supreme Court held that a trial court's incorrect instruction on the definition of reasonable doubt was a structural error since "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an

error of the former sort [structural], the jury guarantee being a 'basic protection' whose precise effects are unmeasurable but without which a criminal trial cannot reliably serve its function." Like the error in *Sullivan*, the error in the instant case should be classified as a structural error since the right to notice of the specific charges and the right to defend against those charges has a "profound judgment about the way in which law should be enforced and justice administered" and a deprivation of that right has consequences that are unquantifiable and indeterminate. *Id.* at 508 U.S. at 280-281 citing *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).

In *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Supreme Court held that an indictment "may not be broadened through amendment except by the grand jury itself." Reversal is required when a constructive amendment occurs. Such amendment arises when the crime charged is "substantially changed at trial, so that it [is] impossible to know whether the grand jury would have indicted for the crime actually proved." *United States v. Tatum*, 19 F.3d 31 (9th Cir. 1994); see also, *United States v. Shipsey*, 190 F.3d. 1081 (9th Cir. 1999). Deprivation of a defendant's basic right to be tried only on those charges presented in an indictment is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. *Stirone v. United States*, *supra*, 80 S.Ct. at 274. Thus, when the crime charged by information is substantially changed at trial, as well, such error should also be deemed reversible per se. The error in the instant case involves a right so fundamental to the fairness of the trial proceedings that it can never be deemed harmless and thus, requires reversal without

regard to the evidence in the instant case. *Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1990). As the Ninth Circuit Court of Appeals recognized in *Sheppard,* "a trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion." *Id.* at 1237. This Court held, "We cannot regard as fair a trial in which the defendant's right to defend was impaired by a lack of notice as to the nature and cause of the accusation. Under these circumstances, lack of constitutionally required notice necessarily denies a defendant the fundamental right to a fair trial. Such errors abort the basic trial process . . . or deny it altogether." *Id.* Contrary to findings of the state court and the United States District Court, petitioner had no notice that he would need to defend against the deliberate and premeditated allegation until after both sides had rested. The lack of constitutionally required notice impaired petitioner's ability to defend himself against the allegation that the attempted murders were deliberate and premeditated and thus, deprived him of his Sixth Amendment right to a fair trial.

In the instant case, after both sides had rested, the trial court permitted the prosecution to amend the information to allege a more serious offense than that which was charged in the information. Because the information was amended following the presentation of all of the evidence, petitioner did not have adequate notice of the specific charges he was facing and thus, was unable to defend against those specific charges. Changing the nature of the offense charged following the presentation of both prosecution and defense evidence, surely infects the entire proceeding especially when a defendant is convicted of a crime greater than the one alleged in the information.

Similar to the requirement of guilt beyond a reasonable doubt, the right to adequate notice of the charges against a defendant has a "profound judgment about the way in which law should be enforced and justice administered" and a deprivation of that right has consequences that are unquantifiable and indeterminate. A defendant should not be convicted of an offense which he was not adequately prepared to defend against. Since an amendment to the information, after both sides had rested, to allege a more serious offense fails to provide the defendant with adequate notice, leaves him unable to prepare and present an adequate defense, and infects the framework within which a trial proceeds, such error is reversible per se.

Even assuming, as the District Court found, that there were facts presented during the preliminary hearing which could support a premeditation allegation, the prosecutor did not ask the judge to hold petitioner over to the superior court on premeditated attempted murder and the initial information did not allege that the attempted murder was premeditated. Thus, petitioner had every reason to assume that the prosecution, for whatever reason, had opted not to allege that the murders were premeditated and thus, could focus his defense on other aspects of the case. The prosecutor then "ambushed" the defense with a new theory of culpability that substantially increased petitioner's potential sentence after the evidence was already submitted and both sides had rested. Thus, whether or not the facts supporting the premeditation allegation were included in the preliminary hearing evidence, the allegation was not included in the information and, therefore, petitioner had no reason to defend against this theory. When the court granted the prosecution's motion to amend the information to allege

premeditation and instructed the jury accordingly, petitioner was convicted on a theory that was neither subject to adversarial testing nor defined in advance of the proceedings. Thus, contrary to the state courts' findings, the error in this case deprived petitioner of his Fifth, Sixth and Fourteenth Amendments' rights and warrants habeas relief.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant certiorari and reverse the California Supreme Court.

Dated: November 5, 2004

Respectfully submitted,

MARILEE MARSHALL
Attorney for Petitioner

APPENDIX A

DARRICK MARTINEZ, Petitioner-Appellant, v. ROSIE GARCIA, Respondent-Appellee.

No. 02-56678

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

379 F.3d 1034; 2004 U.S. App. LEXIS 18081

August 13, 2004, Decided

JUDGES: Before: Ruggero J. Aldisert,* Richard C. Tallman, and Johnnie B. Rawlinson, Circuit Judges.

OPINION:

ORDER

The opinion filed June 10, 2004, is amended as follows:

1. Slip Opinion page 7708, first paragraph, line 9:

   a. Insert "challenging Count 2 of his conviction" after "petition."

   b. Add the following sentence to the end of the paragraph: "For reasons stated in the memorandum disposition issued contemporaneously with this opinion, we affirm the denial of Martinez's petition on all other grounds."

2. Slip Opinion page 7711, first full paragraph after Instruction Number 36 quotation, lines 3, 7, and 9 – replace "Jiminez" with "Jimenez."

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* The Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

3. Slip Opinion page 7716, line 4 – replace "Jimemez" with "Jimenez."

4. Slip Opinion page 7717, paragraph [6], line 5 – replace "Jiminez" with "Jimenez."

5. Slip Opinion page 7718, first full paragraph, line 6 – replace "Jiminez" with "Jimenez."

6. Slip opinion page 7718, paragraph [10], line 3 – replace "Jiminez" with "Jimenez."

7. Slip opinion page 7718, paragraph [11]:

   a. Line 2 – insert "for the attempted murder of Robert Jimenez" after "conviction."

   b. Line 4:

      i. Insert "insofar as it denies relief for the erroneous transferred intent instruction." after "petition."

      ii. Delete "and."

      iii. Insert "We" prior to "remand."

      iv. Insert "that part of Martinez's" after "grant."

   c. Line 5 – delete "the" prior to "petition."

   d. Line 7 – replace "Jiminez" with "Jimenez."

Paragraph [11] as revised should read:

> Because the California Court of Appeal's affirmance of Martinez's conviction for the attempted murder of Robert Jimenez was contrary to clearly established federal law, we REVERSE the district court's denial of Martinez's habeas petition insofar as it denies relief for the erroneous transferred intent instruction. We remand with

instructions to grant that part of Martinez's petition unless the state, within a time to be established by the district court, elects to re-try Martinez on the attempted murder of Robert Jimenez.

With the opinion as amended, the panel has voted to deny the petition for rehearing.

Judges Tallman and Rawlinson voted, and Judge Aldisert recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing filed on June 18, 2004, is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

DARRICK MARTINEZ, Petitioner-Appellant, v. ROSIE GARCIA, Respondent-Appellee.

No. 02-56678

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

371 F.3d 600; 2004 U.S. App. LEXIS 11430

August 5, 2003, Argued and Submitted, Pasadena, California
June 10, 2004, Filed

COUNSEL: Marilee Marshall, Pasadena, California, for the petitioner-appellant.

Warren P. Robinson, Deputy Attorney General, San Diego, California, for the respondent-appellee.

JUDGES: Before: Ruggero J. Aldisert,* Richard C. Tallman, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Rawlinson.

OPINION BY: Johnnie B. Rawlinson

OPINION: RAWLINSON, Circuit Judge:

We presume that a jury follows the instructions given by the trial court. *Ho v. Carey*, 332 F.3d 587, 594 (9th Cir. 2003). When the instructions, however, combine two theories of guilt, one of which is untenable, and we cannot discern upon which theory the jury convicted, structural error has occurred. The state court's decision upholding Martinez's conviction was contrary to clearly established

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* The Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

federal law. Accordingly, the district court's denial of Martinez's habeas petition is reversed.[1]

I. BACKGROUND

The Petitioner, Darrick Martinez, was charged in an information with the attempted murder of Peter Anthony Jimenez; the attempted murder of Robert Paul Jimenez; and shooting at an inhabited dwelling.

Peter Jimenez testified that he was in the living room at his brother's house when he responded to a knock at the front door. He saw Martinez through the screen door. Martinez asked Jimenez to open the door. Jimenez noticed that Martinez's hands were trembling and that he was holding something shiny. With the gun extended arm's length, Martinez shot Jimenez in the chest area. Jimenez was also shot in the back as he ran. Jimenez identified Martinez as the person who shot him.

Robert Jimenez, Peter Jimenez's brother, testified that he was awakened by gunshots. When he went to the kitchen, he found his brother, Peter Jimenez, lying on the floor. After discovering that the kitchen telephone was inoperative, Robert started toward his room to retrieve a cordless phone, and was hit on the side of his chest by a second round of gunshots. He did not see who shot him.

Karen Cervantes, the girlfriend of Robert's son, testified that she heard a bang on the front door and then

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[1] Martinez raised other issues on appeal, which are disposed of in a memorandum disposition filed contemporaneously with this opinion.

gunshots. She also heard Martinez, her cousin, yelling outside the house.

Martinez's brother, Rocky Martinez, and their mother, testified that, except for approximately five minutes, when they went next door to their cousin's house, both brothers were at their mother's home all evening.

Martinez denied shooting the Jimenez brothers and asserted that he was at his mother's house at the time of the incident.

Martinez was charged in an information with the attempted murder of Peter Anthony Jimenez (Count I); the attempted murder of Robert Paul Jimenez, Sr. (Count II); and shooting at an inhabited dwelling (Count III). During trial, the prosecution amended the information to allege that the attempted murders were willful, deliberate, and premeditated.

The trial court instructed the jury on both premeditation and transferred intent in relation to the attempted murder charges. Instruction Number 35 read:

> If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate and premeditated murder.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and

premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation.

To constitute willful, deliberate and premeditated attempted murder, the would-be slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being.

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

Instruction Number 36 read:

When one attempts to kill a certain person, but by mistake or inadvertence injures a different person, the crime, if any, so committed is the same as though the person originally intended to be killed had been injured.

The jury found Martinez guilty on all counts. However, the jury verdict form relating to the allegation that Martinez willfully and deliberately attempted to murder Robert Jiminez either contains a mistake or is evidence

that the jury found Martinez guilty based upon the transferred intent theory. The form is labeled, "First Allegation as to Court 2 [the count regarding Robert Jiminez]," while the body of the form states that: "We . . . find the allegation as to Count 1 [the count regarding Peter Jiminez], that defendant, Darrick Martinez, committed the aforesaid attempted murder willfully, deliberately and with premeditation . . . "

The California Court of Appeal affirmed Martinez's conviction. Martinez subsequently filed a federal habeas petition. The assigned magistrate judge recommended that the district court deny Martinez's federal habeas petition. The district court adopted the magistrate judge's recommendation and entered judgment dismissing Martinez's habeas petition. Martinez filed a timely appeal.

II. STANDARD OF REVIEW

We review *de novo* the district court's denial of a habeas corpus petition. *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are applicable, since Martinez filed his petition after AEDPA's effective date. *See id.*

We may not grant federal habeas relief" unless the state appellate court's[2] "adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as

[2] Because the California Supreme Court denied Martinez's petition summarily, we review the California Court of Appeal decision on habeas review as the last reasoned state court decision. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

determined by the Supreme Court of the United States." *Id.* (citation and internal quotation marks omitted). "A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result." *Id.* (citation omitted). "A state court's decision involves an unreasonable application of federal law if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (citation and internal quotation marks omitted) (alteration in the original). "Even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable." *Id.* (citation omitted).

III. DISCUSSION

The California Court of Appeal and the district court proceeded on the assumption that the transferred intent instruction was inapplicable to Martinez's attempted murder charges and should not have been given. We must therefore determine whether the transferred intent jury instruction introduced structural error into the trial by inviting an improper theory of culpability in Martinez's trial.

The courts' assumptions that the transferred intent instruction was malapropos are well grounded in California case law. In *People v. Czahara*, 203 Cal. App. 3d 1468, 250 Cal. Rptr. 836 (1988), the California Court of Appeal

considered the precise transferred intent instruction given in Martinez's case. *Id.* at 1472. It concluded that:

> The purpose of the transferred intent rule – to ensure that prosecution and punishment accord with culpability – would not be served by convicting a defendant of two or more attempted murders for a single act by which he intended to kill only one person . . . there is a difference in culpability between an assailant who deliberately sets out to kill one person and in addition kills another accidentally, and one who deliberately kills two victims. Application of the transferred intent rule to the former would wipe out that distinction.

Id. at 1474 (citation omitted). The court subsequently held that the instruction was prejudicial:

> We cannot say that the instructional error was harmless. While there was evidence of hostility between Czahara and Johnson which, together with the manner of the attack, would support an inference that Czahara intended to shoot both victims, the jury could easily have entertained a reasonable doubt as to whether Czahara intended to shoot Johnson. Christie testified that the defendant aimed the first shot directly at her; there was no testimony showing at whom the second shot was aimed . . . The conviction for attempted murder of Johnson must therefore be reversed. . . .

Id. at 1475-76.

This California case demonstrates the importance of the intent requirement for attempted murder and the manner in which transferred intent instructions undermine this

pivotal requirement if applied inappropriately by the trial court.

"The *Due Process Clause of the Fourteenth Amendment* denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 265, 105 L. Ed. 2d 218, 109 S. Ct. 2419 (1989) (citation omitted). "Jury instructions relieving States of this burden violate a defendant's due process rights." *Id.* (citations omitted).

In *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990), the United States Supreme Court established that, with respect to ambiguous jury instructions, "in some instances . . . we have held that when a case is submitted to the jury on alternative theories[,] the unconstitutionality of any of the theories requires that the conviction be set aside." *Id.* at 379-80 (citations and internal quotation marks omitted). "In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories." *Id.* at 380. "Although it is possible that the guilty verdict may have had a proper basis, it is equally likely that the verdict . . . rested on an unconstitutional ground . . . and we have declined to choose between two such likely possibilities." *Id.* (citation and internal quotation marks omitted) (alteration in the original).

Similarly, in *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988), the Supreme Court concluded that "with respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be

supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." *Id.* at 376 (citations omitted).

When a defendant is convicted and one of the two grounds supporting the conviction cannot withstand constitutional scrutiny on due process grounds, the trial court's mistake cannot be dismissed as harmless error. *Stirone v. United States*, 361 U.S. 212, 217, 219, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960). Harmless error analysis is not appropriate where the error, the transferred intent instruction, has "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). This is one of those "instructional errors [that is] so serious that [it] amounts to [a] structural defect[], 'which defies analysis by 'harmless-error' standards.' " *Suniga v. Bunnell*, 998 F.2d 664, 667 (1993) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 629, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)).

In *Suniga*, we considered whether the state trial court erroneously instructed the jury on felony-murder when the prosecution's only theory was malice aforethought. *Id.* We observed that the instruction was "an error that allowed the jury to convict Suniga on a theory of culpability that did not exist." *Id.* at 668. We therefore rejected the contention that harmless error was applicable:

> Neither can we, as the state suggests, base a harmless-error determination on the seemingly overwhelming weight of the evidence pointing to the petitioner's guilt of . . . murder. Where two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell

> which theory of culpability the jury followed in reaching a general verdict. Here too, it is impossible to know what the jury (or some juror) did. Here, too, the writ should issue.

Id. at 670 (internal citation omitted) (alteration in the original).

The same concerns arise in this case. We cannot determine whether the jury found that Martinez committed attempted premeditated murder with respect to Robert Jimenez or whether the jury applied the transferred intent doctrine to convict Martinez. This is particularly true since the prosecution, in its opening statement and closing argument, argued premeditation with respect to the attempted murder of Peter Jimemez. However, with respect to Robert Jimenez, the prosecution relied on the transferred intent doctrine. For example, in its opening statement, the prosecution asserted:

> Now, the evidence will point to the premeditation and deliberation of the intent to kill Peter Jimenez, and the intent with regard to Robert Jimenez will be described to you under a doctrine of transferred intent. In other words, if I mean to kill Person A and I kill Person B, if I intended to kill A, that intent transfers to Person B.

Although Robert Jimenez testified that there was a second round of gunshots, which may be indicative of premeditation, the evidence did not overwhelmingly support a conclusion that Martinez intended to murder Robert Jimenez. This is reflected by the prosecution's closing arguments:

> Now, in this particular case, in the person that went to the door, there is absolutely no evidence of heat of passion, quarrel, sudden anger.

> The person went, with a high-caliber weapon, to the front door to confront Peter Jimenez and attempted to kill him.
>
> So I think that you will find that the person at the front door on the morning of January 27 clearly attempted to kill Peter Jimenez. And as you examine the conduct of that person, it is further evidence of his intent to kill by not only does he attempt to shoot him through the front door at arm's length, but as the individual runs to the kitchen, he continues shooting, moving around the house, shooting in the direction in which Peter Jimenez parted. Further evidence of his intent to kill.
>
> Now, as to the injuries suffered by Robert Jimenez, the Judge also instructed you with regard to the doctrine of transferred intent . . . So it is clear from the evidence that has been presented that if you find the defendant attempted – the individual at the door at this point in time attempted to kill Peter Jimenez, he obviously, then, as he continued to fire into the residence, intended to kill Robert Jimenez, Senior.

Additionally, as discussed above, the ambiguity of the special verdict form further confused the matter. We cannot know whether the body of the verdict form mistakenly references Count 1 or whether the jury actually found Martinez guilty of the attempted murder of Robert Jiminez based upon a theory of transferred intent.

The prosecution's transferred intent arguments combined with the erroneous jury instruction and the ambiguous special verdict form render it "impossible to tell which theory of culpability the jury followed in reaching a general verdict." *Suniga*, 998 F.2d at 670 (citation omitted). In particular, we

are unable to tell whether the jury found premeditation for the attempted murder of both Jimenez brothers, or found premeditation with respect to the attempted murder of Peter Jimenez and then transferred that intent to Robert Jimenez pursuant to the jury instruction. If the latter finding informed the jury's verdict, the prosecution only had to establish the requisite intent for the attempted murder of Peter Jimenez, but not for that of Robert Jimenez.

The transferred intent jury instruction amounts to structural error because it permitted the jury to convict on two alternative theories, one of which was an impermissible legal ground. "Because a jury's deliberations are secret and unreported, we have no way of determining" which theory of conviction was the basis of the jury's guilty verdict. *Ho*, 332 F.3d at 596; *see also Arizona v. Fulminante*, 499 U.S. 279, 307-08, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) (implying that harmless error analysis is impermissible where the trial error cannot be "quantitatively assessed in the context of other evidence").

The California Court of Appeal did not identify or apply *Carella*, *Boyde*, or *Mills* in its cursory analysis of the transferred intent issue. Neither did it discuss the concept of structural error. Rather the California Court of Appeal focused on whether, in the court's view, there was sufficient evidence to support the attempted murder count involving Robert Jiminez.

The state court's failure to apply the precepts governing undifferentiated alternative theories of conviction resulted in a decision that is contrary to the clearly established federal law articulated in *Carella*, *Boyde*, and *Mills*.

As we have discussed, the erroneous jury instructions made it impossible to determine whether the jury convicted Martinez of the attempted murder of Robert Jiminez on a premeditation theory, which was legally permissible, or on a transferred intent theory, which was legally impermissible. This circumstance deprived Martinez of his rights under the *due process clause of the Fourteenth Amendment*. *See Carella*, 491 U.S. at 265. This deprivation is not subject to harmless error analysis because it negatively permeated the fundamental structure of Martinez's trial. *See Suniga*, 998 F.2d at 667.

Because the California Court of Appeal's affirmance of Martinez's conviction was contrary to clearly established federal law, we REVERSE the district court's denial of Martinez's habeas petition and remand with instructions to grant the petition unless the state, within a time to be established by the district court, elects to retry Martinez on the attempted murder of Robert Jiminez.

REVERSED and REMANDED.

APPENDIX C

DARRICK MARTINEZ, Petitioner – Appellant, v. ROSIE GARCIA, Respondent – Appellee.

No. 02-56678

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

100 Fed. Appx. 702; 2004 U.S. App. LEXIS 11569

August 5, 2003, Argued and Submitted, Pasadena, California
June 10, 2004, Filed

COUNSEL: For DARRICK MARTINEZ, Petitioner – Appellant: Marilee Marshall, Esq., MARILEE MARSHALL & ASSOCIATES, INC., Los Angeles, CA.

For ROSIE GARCIA, Respondent – Appellee: Warren P. Robinson, DAG, AGCA – OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (SAN DIEGO), San Diego, CA.

JUDGES: Before: ALDISERT,** TALLMAN, and RAWLINSON, Circuit Judges.

OPINION:

MEMORANDUM*

1. Darrick Martinez ("Martinez") failed to establish that the state appellate court's decision to permit amendment of the indictment was contrary to or an unreasonable

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** The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

application of clearly established United States Supreme Court precedent. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Martinez's reliance on *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000), is misplaced. *Apprendi* did not directly address the issue of notice to the defendant of the criminal charges and is therefore not controlling. *See Clark*, 331 F.3d at 1069. The dicta in *Jones* is similarly of no assistance to Martinez, since clearly established law for purposes of habeas review is that propounded by the United States Supreme Court. *See id.*

2. The denial of Martinez's motion for a mistrial based on a witness's emotional outburst was not constitutional error. A jury's exposure to facts not in evidence is subject to *Brecht* harmless error analysis. *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). Since several witnesses identified Martinez as the assailant, Martinez failed to demonstrate that the witness's statement "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahmson*, 507 U.S. 619, 631, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (citation omitted). The jury was also "carefully admonished . . . to ignore [the] statement and there is a strong presumption that the court's curative instruction was followed by the jury." *Mancuso v. Olivarez*, 292 F.3d 939, 952 (9th Cir. 2002) (citation omitted).

3. Martinez also failed to establish that he was prejudiced by his wearing of a stun belt. Since the trial court took steps to ensure that the stun belt was not visible to the jury, no error resulted. *See Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir. 1999). Use of the stun belt therefore did not have a "substantial and injurious effect or influence in

determining the jury's verdict" *Williams v. Woodford*, 306 F.3d 665, 689 (9th Cir. 2002) (citation omitted).

PETITION DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARRICK MARTINEZ, Petitioner, v. ROSIE GARCIA, Warden, Respondent.	) NO. ED CV 01-766-GHK (E)) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE) (Filed May 17, 2002)

This Report and Recommendation is submitted to the Honorable George H. King, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 01-13 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on October 12, 2001 ("Pet."), accompanied by a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus ("Pet. Mem."). Respondent filed an Answer on December 7, 2001, accompanied by a Memorandum of Points and authorities ("Resp. Mem."). Petitioner filed a Traverse on January 22, 2002 ("Trav.")

BACKGROUND

An amended information charged Petitioner with the attempted murders of Peter Anthony Jimenez and Robert Paul Jimenez, Sr., in violation of California Penal Code

sections 664 and 187 (Counts I and II), and alleged Petitioner personally had discharged a firearm causing great bodily injury to the victims, within the meaning of California Penal Code section 12022.53(d) and (e)(1) (Clerk's Transcript ["C.T."] 47-48).[1] Count III of the amended information alleged petitioner had shot into an inhabited dwelling, in violation of California Penal Code section 246 (C.T. 48). The amended information further alleged Petitioner had served a prior prison term, within the meaning of California Penal Code section 667.5(b) (C.T. 49).

On June 8, 1998, the court granted Petitioner's motion for a mistrial on the ground a prospective juror had made a comment about Petitioner (C.T. 62). The court commenced new jury selection proceedings the next day (C.T. 64). On June 15, 1998, the court granted another defense motion for a mistrial on the grounds that petitioner had obtained retained counsel and that Petitioner had committed misconduct during trial (C.T. 70). Petitioner's third trial commenced on October 5, 1998 (C.T. 79).

After both sides had rested in Petitioner's third trial, the prosecution moved to amend the amended information to allege that both attempted murders were willful, deliberate and premeditated, within the meaning of California Penal Code section 664(a) (Reporter's Transcript ["R.T."] 464-65;

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[1] Although the amended information in the record does not contain a Count I (*see* C.T. 47-51), neither Petitioner nor Respondent appears to contend the actual amended information was deficient in this respect. Petitioner does not premise any claim on an omission of Count I from the amended information. Count I of both the felony complaint and the original information alleged that Petitioner attempted to murder Peter Jimenez (C.T. 1-5, 9-11).

C.T. 94). The court allowed the amendment over a defense objection (R.T. 464-65).

The jury found Petitioner guilty of the charges alleged in Counts I, II and III, and further found true the allegations that the attempted murders were willful, premeditated and deliberate (R.T. 536-45; C.T. 100, 230-36). At a bifurcated proceeding, the court found true the allegation that Petitioner had served a prior prison term (R.T. 557-59; C.T. 247). The court sentenced Petitioner on Counts I and II to two consecutive terms of life with the possibility of parole plus 25 years to life on each firearm enhancement, and sentenced Petitioner on Count III to a consecutive term of seven years plus one year on the prior prison term enhancement (R.T. 629-31; C.T. 295-97).

The Court of Appeal affirmed Petitioner's conviction, but ordered the trial court to strike the prior prison term enhancement (Pet. Ex. A, pp. 2-15). The California Supreme Court denied Petitioner's petition for review without opinion (Pet. Ex. C, p. 57).

SUMMARY OF TRIAL EVIDENCE

I. Prosecution Case-in-Chief

On January 25, 1998, Robert Jimenez, Sr. hosted a Super Bowl Party at his residence (R.T. 67, 156). The party was attended by, among others, Robert's brother Peter, Petitioner, and Petitioner's brother Rocky (R.T. 67-69, 71). Peter was "close friends" with Petitioner, and the two had known each other for over twenty-five years (R.T. 66-67). Peter was staying temporarily at the house (R.T. 84). Also present in the home were other residents: Robert's girlfriend, Lisa Calderon, Petitioner's cousins, Karen and

Joseph ("Joey") Cervantes, and Karen's one-year-old baby, who was Robert's grandson (R.T. 68-69, 72, 145).

At the party, Peter and Petitioner "did" some methamphetamine (R.T. 68). Peter and Robert made, and won, a bet with Petitioner on the Super Bowl game (R.T. 75-76). Robert took Petitioner to an ATM machine to get money to pay the bet, and then they returned to the house (R.T. 76-77, 165-66). After most of the guests had left, Peter, Petitioner, Rocky, Joey, and another friend, "Bengie," remained for a while, drinking and using more methamphetamine (R.T. 68-70).

The following morning, Peter saw Petitioner and Rocky outside the house, talking to Joey (R.T. 72). When Peter walked up, Petitioner asked Peter if someone were trying to kill Petitioner or Rocky (R.T. 72-74). Peter said he did not know what Petitioner was talking about (R.T. 74). Petitioner and Rocky also asked Robert Jimenez whether Robert knew if someone were trying to kill Petitioner or Rocky (R.T. 74). After Robert told Petitioner and Rocky to go home and get some sleep, the two left (R.T. 75). Later, Petitioner and Rocky returned to the Jimenez house to get some groceries out of the freezer, and then left again, around noon (R.T. 75, 77). Peter remained at the, house, drinking a few beers and doing "one line" of methamphetamine (R.T. 77). By about 11:30 p.m., everyone was in bed except for Peter (R.T. 77-78).

About midnight, Peter was lying on the couch watching television when someone knocked at the door (R.T. 63-65). Peter, opened the wood door, but did not open the locked metal screen door (R.T. 78-79, 107). Either a front porch light or a motion sensor was on, enabling Peter to see clearly who was at the door (R.T. 111). Petitioner was

standing there with his left hand on the door handle and his right hand down toward the bottom of his legs (R.T. 65, 78, 118). Petitioner was wearing a black cap and a black shirt or jacket (R.T. 116).

Peter refused Petitioner's request to open the door, saying everyone was asleep and Peter was going to bed (R.T. 79). When Petitioner looked down, Peter also looked down (R.T. 79). Peter saw petitioner trembling, and saw something shiny in Petitioner's right hand (R.T. 79, 117). Peter asked Petitioner "what have you got there?" (R.T. 79). Petitioner put a handgun up to the door and fired from a distance of an arm's length from Peter (R.T. 79-80).

The bullet hit Peter in the upper right chest (R.T. 80). Peter turned to run to the telephone in the kitchen to call 911, and heard more shots (R.T. 80-81, 108). Right before Peter reached the doorway to the kitchen, a bullet struck Peter in the back (R.T. 80, 108).

Peter's legs went numb, and, as he began to fall, a third bullet hit him in the arm (R.T. 80, 108). As he fell onto the kitchen floor, Peter heard four or five more shots (R.T. 81, 109). Peter reached up and grabbed the kitchen telephone (R.T. 81, 108). Someone was on the line (R.T. 81).

The sound of gunshots woke Robert, who was in his bedroom (R.T. 147, 150). Robert arose and entered the kitchen through the laundry room (R.T. 147). Robert saw Peter lying on the floor in the kitchen near the doorway between the kitchen and the living room (R.T. 147, 150-51). Robert grabbed the phone from Peter, but found it did not work (R.T. 147). Robert turned to go to his room to get his cell phone, but, as he turned, another series of shots occurred and a bullet hit Robert on the left side of the

chest (R.T. 147). Robert did not see the shooter (R.T. 148-49).

Robert returned to his room and dialed 911 (R.T. 149). Robert also called Petitioner's mother to tell her there had been a shooting at the house (R.T. 151).

Lisa Calderon also awoke when she heard gunshots, and followed Robert into the kitchen (R.T. 204). Lisa saw Peter stumble toward the kitchen and fall (R.T. 204-05). Lisa went to the kitchen window and looked out (R.T. 205-06). The area was well-lit because of lighting from nearby train tracks (R.T. 207, 219-20). Lisa saw Petitioner, whom she had known since elementary school, standing outside with, a handgun in his hand (R.T. 206-07, 220-22). Petitioner was "yelling like a crazy man" (R.T. 206-08).

The gunshots also woke Karen Cervantes, who put her baby on the floor and lay on top of him until the gunshots stopped (R.T. 190-91). Karen heard somebody yelling throughout the incident, and identified that person as Petitioner, her cousin whom she had known all her life (R.T. 191-92). Karen testified she had "no doubt" the voice she heard yelling was Petitioner's (R.T. 192).

Before the police arrived, Peter told Robert that Petitioner was the shooter (R.T. 119). When the police arrived, Peter identified Petitioner as the shooter (R.T. 105-06, 119).

Ten or fifteen minutes after the shooting, Karen called the home of her grandmother, Petitioner's aunt (R.T. 197). Karen's uncle, Carlos Martinez, answered the telephone (R.T. 197). Karen told Carlos that there had been a shooting and that Petitioner was involved (R.T. 197-98).

There were bullet holes in the front door (R.T. 165), Police also found bullet holes in the south living room wall, which was the wall between the living room and the kitchen, opposite the front door (R.T. 127-29, 132, 134). A police officer testified the couch upon, which Peter had been lying was against the south living room wall, approximately 10-15 feet from the front door (R.T. 416). There was a bullet hole in the south kitchen wall, which was the wall between the kitchen and the laundry room (R.T. 136). There were two bullet holes in a window on the west living room wall and one bullet hole in a lamp shade inside the living room (R.T. 130-31). There was a bullet hole in the south wall of the bedroom in which Karen Cervantes and her baby had been sleeping (R.T. 134-35, 146, 173-74). Police found expended bullet casings outside the house (R.T. 57, 59-60, 174-77).

II. Defense Case

Rocky Martinez, Petitioner's brother, testified he and Peter used methamphetamine on the Friday, Saturday and Sunday before the shooting (R.T. 250-51). Rocky testified Peter used methamphetamine "continually" and also smoked marijuana and drank hard liquor during this period (R.T. 251, 258). Rocky denied that he or Petitioner asked Robert or Peter if they knew of anybody who was trying to kill Rocky or Petitioner (R.T. 254).

According to Rocky, on Monday, after he and Petitioner stopped by the Jimenez house to pick up some meat, they went to their mother's house, where they spent the rest of the night lying in recliners until the police came (R.T. 254-57, 270-71, 275). However, Rocky also said that, sometime between 9:00 and 11:00 p.m., Petitioner and

Rocky went next door to Carlos Martinez' house to watch HBO (R.T. 256). Martinez said he was tired and did not want to watch television, so Petitioner and Rocky returned to their mother's house after about five minutes (R.T. 256). Rocky also said that, when they returned, Rocky smoked a cigarette in the front yard and moved his truck before he and Petitioner went inside (R.T. 257, 276-78). According to Rocky, Petitioner did not leave the house around midnight (R.T. 257). Rocky also said Petitioner never wore caps (R.T. 257).

Petitioner testified Peter and Robert Jimenez were like Petitioner's "brothers," and Peter was Petitioner's "best friend" (R.T. 285-86, 289). Petitioner denied shooting Peter and Robert, and said he was at his mother's house at the time of the shootings (R.T. 298).

Petitioner said that, during the Super Bowl party, Peter approached Petitioner a few times and asked Petitioner, if he knew anything about Peter's wife (R.T. 288). However, Petitioner said there were no threats or problems that Sunday, or any time that weekend (R.T. 289).

Petitioner observed Peter using methamphetamine at the party (R.T. 290). Petitioner acknowledged losing a Super Bowl bet with Robert and Peter, but said there were no fights or arguments (R.T. 290-91). Petitioner left the Jimenez house Sunday around midnight (R.T. 290).

The next day, when Petitioner picked up his brother at the Jimenez house, Peter again asked Petitioner if Petitioner knew anything about Peter's wife, and told Petitioner Peter knew Petitioner had something to tell him (R.T. 291-92). Petitioner thought this somewhat peculiar (R.T. 292). Petitioner denied ever asking Peter or Robert if

they knew of anyone who was trying to kill Petitioner or Rocky (R.T. 292).

After leaving the Jimenez house, Petitioner drove to his house in Fontana, where Petitioner and Rocky stayed a few hours (R.T. 292-93). Petitioner and Rocky stopped by the Jimenez house again to pick up some meat, then went to their mother's house about five or six blocks away, arriving about 4:00 p.m. (R.T. 293-94, 308-09). The two allegedly stayed at their mother's house the rest of the evening, watching television (R.T. 294, 310). Petitioner's mother was taking care of Petitioner's brother and the brother's wife, both of whom required medical care (R.T. 295). Petitioner said his mother was catnapping in between doing her chores (R.T. 297-98).

Petitioner acknowledged that, when the eleven o'clock news was just about over, he and Rocky went over to Carlos Martinez' house next door to watch HBO (R.T. 298-99). According to Petitioner, Martinez said he had just gone to bed, so Petitioner and Rocky returned to their mother's house, where they sat on the porch while Rocky smoked a cigarette (R.T. 299, 312). Thereafter Rocky moved his truck (R.T. 313). Although Petitioner initially testified he did not leave his mother's house around midnight, he later said he was at Carlos' house "about midnight" (R.T. 298, 311). Petitioner said he was wearing a navy blue sweatshirt and blue pants that night (R.T. 299-300). Petitioner owned a black cap, but was not wearing it (R.T. 300).

On cross-examination, Petitioner admitted telling a police officer, about 2:45 a.m., the morning after the shooting, that "this will all clear up" and "they are, my

buddies" (R.T. 329). Petitioner also admitted that, during Lisa Calderon's testimony at a previous court hearing, Petitioner had volunteered the following statement: "All the shots were, say, within 40 seconds." (R.T. 328). Petitioner explained that he made this statement because he thought Lisa was exaggerating the facts, and that Petitioner based the statement upon Petitioner's review of the police reports and other testimony that the shots were fired within a few seconds of each other (R.T. 328, 332).

Petitioner also admitted having suffered a prior felony conviction for aggravated assault (R.T. 300). Although the court had made a pretrial ruling that the prosecution's use of this conviction for impeachment was limited to a showing that Petitioner had suffered the assault conviction (R.T. 5-6), on cross-examination Petitioner volunteered that the conviction arose out of an incident in jail and involved the use of steel-toed boots (R.T. 300, 314-15).

Petitioner's mother testified Petitioner was at her house on the Monday evening after the Super Bowl (R.T. 392). According to Petitioner's mother, Petitioner and Rocky arrived about 4:00 or 5:00 that afternoon (R.T. 393). Petitioner's mother was busy caring for her husband, her son, and her son's wife (R.T. 393-94). She said she would take naps when someone else was there to care for her son, who needed help 24 hours a day (R.T. 394). After Petitioner and Rocky arrived, Petitioner's mother took catnaps (R.T. 394-95). Petitioner's mother said Petitioner and Rocky did not leave the house any time before midnight, although she acknowledged that about midnight Petitioner and Rocky were talking about going to see a movie on HBO (R.T. 397).

Carlos Martinez testified that, on Monday evening, Petitioner and Rocky had come to Carlos' house' wanting to watch HBO, but Carlos did not let them in (R.T. 409-08). Around midnight, Carlos received a telephone call from Karen Cervantes. (R.T. 408). Carlos told Karen that Petitioner and Rocky had just left Carlos' house five minutes before (R.T. 408). On cross-examination, Carlos testified that, in the telephone call, Karen told Carlos Petitioner shot the Jimenez brothers (R.T. 411). Carlos said Petitioner and Rocky had been to Carlos' house about five or ten minutes before Karen's call (R.T. 411-12).

A police officer who took Peter's statement at the hospital testified that Peter told the officer Peter was lying on the couch watching television when he looked up and saw Petitioner at the door, but the officer did not recall Peter saying Peter got up from the couch and opened the door (R.T. 239-40). According to the officer, Peter said Petitioner pulled out an "object" and fired several rounds through the screen door at Peter (R.T. 243).

A police officer who participated in Petitioner's arrest at his mother's house testified that, at the time of his arrest, Petitioner was wearing a blue sweatshirt and black pants (R.T. 425-26). The officer did not recall if Petitioner was wearing a cap, but testified that the arrest information sheet did not record that Petitioner was wearing a cap (R.T. 426). The officer did not notice anything leading him to believe Petitioner was under the influence (R.T. 426-27). On cross-examination, the officer testified that there was a gray pickup truck in front of the house, and that, when the officer touched it, the hood was warm, although it was a cold night in January (R.T. 433-34).

A physician with a speciality [sic] in addiction medicine testified about the appearance and behavior of a person under the influence of methamphetamine, stating that such persons can experience confusion, paranoia, and hallucinations (R.T. 335-47, 375-77). Asked his opinion on the perception abilities of a person who had been "partying one day, using quite a bit of methamphetamine periodically throughout the day, up that night, using methamphetamine the next day, and then going to midnight of that day," the doctor said such a person's perception abilities would be "clearly worse" than those of a person who was not under the influence (R.T. 378-79).

III. Prosecution Rebuttal

The police officer who spoke with Peter Jimenez at the Jimenez house following the shootings, and who interviewed Peter later at the hospital, testified he observed nothing indicating Peter was under the influence (R.T. 440). Robert Jimenez testified that Peter's physical condition was "normal" when Robert went to bed Monday night, and that Peter then was not hallucinating or acting crazy or "drugged out" (R.T. 445-46). Robert also testified the shooting had occurred within a period of time "no longer than ten seconds" (R.T. 447).

PETITIONER'S CONTENTIONS

After exhausting state remedies, Petitioner contends:

1. The trial court allegedly violated the Fifth, Sixth and Fourteenth Amendments by permitting the prosecution to amend the information after both sides had rested;

2. The trial court allegedly violated the constitution by giving a transferred intent instruction which assertedly lessened the prosecution's burden of proof;

3. The trial court allegedly gave a prior inconsistent statement instruction (CALJIC 2.03) which assertedly lessened the prosecution's burden of proof;

4. The trial court allegedly deprived Petitioner of his Sixth Amendment right to a fair trial by an impartial jury;

5. The trial court allegedly violated Petitioner's rights to due process and a fair trial by forcing Petitioner to wear a "stun belt" at trial;

6. The trial court allegedly denied Petitioner a fair trial by denying Petitioner's motion for a mistrial following Lisa Calderon's unsolicited testimony that Petitioner had "gotten away with murder before"; and

7. Cumulative error allegedly entitles Petitioner to habeas relief.

DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed with prejudice.

I. Standard of Review

The Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, signed by the President on April 24, 1996 ("AEDPA"). Therefore, AEDPA's provisions apply. *See Lindh v. Murphy,* 521 U.S. 320, 336-37 (1997); *Jeffries v. Wood,* 114 F.3d 1484, 1499 (9th Cir.)

(en banc), *cert. denied,* 522 U.S. 1008 (1997). AEDPA provides, in relevant part, that an application for writ of habeas corpus on behalf of a person in state custody shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); *Williams v. Taylor,* 529 U.S. 362, 405-09 (2000); *Tran v. Lindsey,* 212 F.3d 1143, 1149 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000).

II. Petitioner's Claim that Belated Amendment of the Information Violated the Constitution Does Not Warrant Habeas Relief.

A. Background

After both sides rested, but prior to closing argument and prior to the conference on jury instructions, the prosecution sought to amend the amended information to allege that the attempted murders were willful, deliberate, and premeditated (R.T. 464-65).[2] The prosecutor stated he had provided the defense with proposed jury instructions concerning such allegations during Petitioner's "previous

[2] The prosecution previously had amended the information to make date corrections (C.T. 47-51, 67; R.T. 36). However, the Court henceforth adheres to the convention adopted by the parties of referring to the previously amended information as the "information."

trial," which had resulted in a mistrial (R.T. 465).[3] Petitioner's counsel objected that any amendment would be untimely and prejudicial (R.T. 465-66). However, the defense did not seek to reopen the case. The court allowed the amendment, finding that the prosecution's theory and the evidence previously had been known to the defense, and that there was no "prejudicial surprise to the defense" (R.T. 465-66). Thereafter, after conferring with the parties on jury instructions, the court instructed the jury on *inter alia*, premeditation and deliberation (R.T. 491-93; C.T. 142-43). The jury found the allegations of premeditation and deliberation true with respect to both counts of attempted murder (R.T. 536-37; C.T. 231-34).

The Court of Appeal rejected Petitioner's contention that the belated amendment of the information prejudiced Petitioner. The Court of Appeal approved the trial court's reasoning that the amendment could not have surprised the defense "because the theory of the prosecution and the evidence which the prosecution proffered in this case had been known to the defense from the outset" (Pet. Ex. A, P, 8).

B. Discussion

In California, one convicted of attempted murder may be sentenced to a prison term of five, seven or nine years. Cal. Penal Code § 664(a). However, the sentence for willful, deliberate and premeditated attempted murder is

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[3] It is likely the prosecutor was referring to Petitioner's second trial. Petitioner's first trial ended in a mistrial during jury selection (C.T. 62). The court declared a mistrial in Petitioner's second trial after the prosecution had rested (C.T. 67-70).

life with the possibility of parole. *Id.* A defendant may not receive the life sentence specified for willful, deliberate and premeditated attempted murder "unless the fact that the attempted murder was willful, deliberate and premeditated is charged in the accusatory pleading and admitted or found true by the trier of fact." *Id.*

In *People v. Bright,* 12 Cal. 4th 652, 669, 49 Cal. Rptr. 2d 732, 742, 909 P.2d 1354 (1996), *cert. denied,* 518 U.S. 1006 (1996), the California Supreme Court held that the crime of attempted murder is not divided into degrees. Rather, section 664(a) "sets forth a penalty provision prescribing an increased sentence (a greater base term) to be imposed upon a defendant's conviction of attempted murder when the additional specified circumstances are found true by the trier of fact." *Id.* (footnote omitted).

The Sixth Amendment requires that a criminal defendant be "notified of" the nature and cause of the accusation. *See Cole v. Arkansas,* 333 U.S. 196, 201 (1948). This provision is fully applicable to the states. *Calderon v. Prunty,* 59 F.3d 1005, 1009 (9th Cir. 1995); *see also Argersinger v. Hamlin,* 407 U.S. 25, 27-28 (1972). To determine whether the defendant received constitutionally adequate notice, a court looks "*first* to the information." *Calderon v. Prunty,* 59 F.3d at 1009 (emphasis added); *Lincoln v. Sunn,* 807 F.2d 805, 812 (1987). However, "a defendant can be adequately notified of the nature and cause of the accusation against him by means other than the charging document." *Calderon v. Prunty,* 59 F.3d at 1009-10 (citations and footnote omitted); *Morrison v. Estelle,* 981 F.2d 425, 427 (9th Cir. 1992), *cert. denied,* 508 U.S. 920 (1993); *Sheppard v. Rees,* 909 F.2d 1234, 1236 n.2 (9th Cir. 1989); *Lincoln v. Sunn,* 805 F.2d at 814. Recently, in *Hartman v. Lee,* 283 F.3d 190, 195-96 (4th Cir. 2002),

the Fourth Circuit rejected the suggestion that, in a state prosecution, the Sixth and Fourteenth Amendments require that the charging document set forth all the elements of the offense. The *Hartman* Court upheld the constitutionality of North Carolina's "short-form" murder indictment against a challenge that the indictment unconstitutionally failed to allege first degree murder on a theory of premeditation. *See also* 4 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure,* § 19.3 (2d Ed. 1999) (characterizing as "dubious" the suggestion that the Sixth Amendment requires a charging document to contain all of the elements of the charged offense).[4]

In addition to the charging document, sources such as the prosecutor's opening statements, proposed jury instructions, and the trial evidence may provide the requisite notice. *See Murtishaw v. Woodford,* 255 F.3d 926, 954 (9th Cir. 2001), *cert. denied,* 122 S. Ct. 1313 (2002) (prosecution's opening statement and evidence provided defendant with notice of prosecution's felony-murder theory; fact that defense counsel did not seek a continuance when prosecutor requested felony-murder instructions showed counsel had notice); *Calderon v. Prunty,* 59 F.3d at 1009 (prosecutor's opening statement and statements at subsequent hearing, along with trial evidence and trial court's description of crime scene, provided adequate notice of prosecution's lying-in-wait theory); *Stephens v. Borg,* 59

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[4] The court in *Hartman v. Lee* relied in part on *Bergemann v. Backer,* 157 U.S. 655 (1895), in which the Supreme Court held that New Jersey's "short-form" murder indictment (alleging the petitioner "did willfully, feloniously, and of his malice aforethought kill and murder" the victim) did not unconstitutionally deprive the defendant of notice of a first degree murder charge. *Hartman v. Lee,* 283 F.3d at 197.

F.3d at 935-36 (notice sufficient where prosecution submitted felony-murder instruction while defense was still putting on evidence, five days prior to closing argument, and there was substantial evidence supporting felony-murder theory); *Morrison v. Estelle,* 981 F.2d at 28-29 (notice sufficient where prosecutor requested felony-murder instructions at initial jury instruction conference, two days prior to defense closing argument, and there was substantial evidence to support felony-murder theory).

Despite Petitioner's argument to the contrary (*see* Pet. Mem., p. 15), Petitioner did have notice that he was facing two life sentences for premeditated attempted murder. Petitioner does not dispute that the prosecution had submitted premeditation and deliberation instructions during Petitioner's earlier trial, as to which a mistrial was declared. At Petitioner's third trial, the prosecutor indicated in his *opening statement* that the court would instruct the jury concerning premeditated and deliberate attempted murder, and described the content of the premeditation instructions (R.T. 50-51). Additionally, and as the trial court noted, Petitioner's counsel was aware that the case involved a potential life sentence, because the parties were afforded twenty peremptory challenges during jury selection, the number of peremptories reserved for cases involving potential life sentences (R.T. 2, 474-75). In fact, prior to the commencement of voir dire, the court stated: " . . . let's go through the matters that we have discussed in the voir dire conference, *this being a case which involves a potential life sentence if a guilty verdict is rendered on either Count I or Count II*" (R.T. 2) (emphasis added). The prosecution also presented substantial evidence of premeditation and deliberation. Simply stated, there was no "ambush." Because Petitioner was afforded

ample notice of the charges of premeditated and deliberate attempted murder, amendment of the information did not violate the Sixth Amendment.

Petitioner contends the mere absence of premeditation allegations from the information constitute "*per se* reversible," *i.e.*, structural, error. Petitioner relies upon, *inter alia, Stirone v. United States,* 361 U.S. 212 (1960) ("*Stirone*"), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000).("*Apprendi*") (Pet. Mem., pp. 14-17).

In *Stirone*, the Supreme Court held that a conviction on a charge not alleged in the indictment which violated the *Fifth* Amendment's requirement of indictment by a grand jury could not be harmless:

> "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. [citations]. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for [an offense] which the grand jury did not charge."

Stirone v. United States, 361 U.S. at 217-18. "*Stirone* requires that courts distinguish between constructive amendments of the indictment, which are reversible *per*

se, and variances between indictment and proof, which are evaluated under the harmless error doctrine." *United States v. Young,* 730 F.2d 221, 223 (5th Cir. 1984); *see also United States v. Von Stoll,* 726 F.2d 584, 586, 587 (9th Cir. 1984).

However, the Fifth Amendment's requirement of indictment by grand jury does not apply to the states. *Hurtado v. California,* 110 U.S. 516, 534-38 (1884); *James v. Reese,* 546 F.2d 325, 327-28 (9th Cir. 1976); *see also Hartman v. Lee,* 283 F.3d at 194 n.3 (in analyzing claim that "short-form" murder indictment violated Sixth Amendment, federal cases involving grand jury indictments "are of little value when evaluating the sufficiency . . . of a state accusatory pleading"; citations omitted). As indicated above, Ninth Circuit cases interpreting the Sixth Amendment hold that a criminal defendant may obtain constitutionally adequate notice from a source other than the charging document.

In *Apprendi,* the United States Supreme Court held unconstitutional a New Jersey hate-crime statute that allowed a judge to impose a lengthier sentence if the judge found by a preponderance of the evidence that the defendant committed the charged crime for the purpose of intimidating a member of a protected group on account of his or her group identity. Disapproving an analysis focusing upon the distinction between an "element" and a "sentencing factor," the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490, 493-94.

Apprendi's actual holding does not apply here, for Petitioner's trial court submitted the issue of premeditation to the jury under appropriate reasonable doubt instructions. Petitioner does not contend otherwise. However, Petitioner cites *Apprendi* for its alleged implications concerning the contents of a charging document. (*see* Pet. Mem., p. 15; Trav., p. 5). The *Apprendi* Court indicated that the answer to the question whether Apprendi had a constitutional right to a jury trial on a factor which increased the maximum potential punishment was "foreshadowed by our decision in *Jones v. United States,* 526 U.S. 227 (1999), ... [which noted that] 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment,* submitted to a jury, and proven beyond a reasonable doubt.' [*Jones v. United States,* 526 U.S.] at 243 n.6. The Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi,* 530 U.S. at 476 (emphasis added).

This statement is dictum to the extent it speaks to the contents of a state court charging document. The *Apprendi* Court expressly declined to reach the issue whether the constitution required the hate-crime enhancement to be contained in the state grand jury indictment:

> "Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the 'due process of law' that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to trial by jury [citation], and the right to have every

> element of the offense proved beyond a reasonable doubt [citation]. That Amendment [*i.e.*, the Fourteenth Amendment] has not, however, been construed to include the Fifth Amendment right to 'presentment or indictment, of a Grand Jury,' that was implicated in our recent decision in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998). We thus do not consider the indictment question separately today.

Apprendi, 530 U.S. at 477 n.3.[5] Dictum does not constitute "clearly established" Supreme Court law within the meaning of 28 U.S.C. section 2254(d)(1). *See Williams v. Taylor,* 529 U.S. at 412 (AEDPA's "clearly established" phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions"); *Van Tran v. Lindsey,* 212 F.3d at 1154 ("the only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court. [citing *Williams v. Taylor, supra*]").

Nevertheless, the analysis is complicated by *Jones v. Smith,* 231 F.3d 1227 (9th Cir. 2000). In *Jones,* the prosecution and the defense tried a California attempted murder case under the shared but mistaken impression that the information charged premeditation. *Id.* at 1230. The court instructed the jury to determine whether the attempted murder was premeditated and deliberate, and the jury convicted the defendant of premeditated and deliberate attempted murder. *Id.* Although at the time the defendant's conviction became final the California

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[5] In *Almendarez-Torres v. United States,* 523 U.S. 224, 239-40 (1998), the Court held the constitution did not require the federal government to allege prior convictions constituting sentencing enhancements in the indictment.

Supreme Court had not yet decided *People v. Bright,* under then-existing California case law the increased penalty for premeditated attempted murder was deemed a sentencing enhancement. *Jones v. Smith,* 231 F.3d at 1233-34. Nevertheless, the petitioner claimed he had been convicted of a crime never charged in the information, in violation of his Sixth Amendment right to be informed of the nature of the accusation against him. *Id.* at 1230-31.

The *Jones* Court did not analyze this issue by "look[ing] first to the information" and then inquiring whether the petitioner received adequate notice from a source other than the information, the procedure set forth in Sixth Amendment cases such as *Calderon v. Prunty, Morrison v. Estelle* and *Sheppard v. Rees.* Rather, the *Jones* Court cited *Stirone* for the proposition that, "where a defendant is convicted of a crime and where a *grand jury* never charges the defendant with an essential element of that crime, a constructive amendment has occurred, and reversal is warranted." *Id.* at 1232-33 (emphasis added). The *Jones* Court continued: "If, on the other hand, the variation between proof and indictment does not effectively modify an essential element of the offense charged, the trial court's refusal to restrict the jury charge to the words of the indictment is merely another of the flaws in trial that mar its perfection but do not prejudice the defendant." *Id.* at 1233 (citation and internal quotations omitted). The court also indicated that any distinctions between a state court information and a federal grand jury indictment were "not relevant for Sixth Amendment purposes." *Jones v. Smith,* 231 F.3d at 1232 n.1 (citation omitted).

A concern for notice undergirds both the Fifth Amendment's grand jury indictment provision and the Sixth

Amendment's express guarantee of notice. *See United States v. Russell,* 369 U.S. 749, 763-66 (1962); *Cole v. Arkansas,* 333 U.S. at 201-02. However, as discussed shove, *Stirone*'s "*per se* reversal" rule is grounded only in the Fifth Amendment's requirement of a grand jury indictment, a requirement inapplicable to a state prosecution.

The *Jones* Court also drew upon an earlier case involving a state grand jury indictment, *Lincoln v. Sunn,* 807 F.2d 805 (9th Cir. 1987): "[u]nder *Lincoln,* the difference between a constructive amendment and a mere variance therefore hinged on whether the crime specified in the indictment/information [sic] and the crime for which the defendant was convicted are separate offenses under state law." *Jones v. Smith,* 231 F.3d at 1234. Because California law deemed the premeditation allegation to be a sentence enhancement, the *Jones* court concluded that the omission of those allegations from the information did not constitute a "constructive amendment" under the standards set forth in *Lincoln v. Sunn. Jones v. Smith,* 231 F.3d at 1234.

While Jones' petition for review was pending in the California Supreme Court, the United States Supreme Court issued its opinion in *Apprendi.* Despite *Apprendi*'s express refusal to consider the issue whether the prosecution in that state habeas case was required to allege in the charging document any fact which could increase the maximum punishment, *see Apprendi,* 530 U.S. at 477 n.3 (quoted above), the Ninth Circuit in *Jones v. Smith* interpreted *Apprendi* as follows:

> "Although *Apprendi* involved a failure to submit a factual determination to a jury for proof beyond a reasonable doubt rather than a

> discrepancy between an indictment and conviction, *Apprendi*'s implications for this latter line of cases is underlined by this Court's extensive discussion of the historical unity between those facts that must be charged in an information and those that must be proven beyond a reasonable doubt. *See* [*Apprendi,* 520 U.S. at 476-80, 120 S. Ct.] at 2355-57; *see also United States v. Aguayo-Delgado,* 220 F.3d 926, 933 (8th Cir. 2000) (interpreting *Apprendi* to mean that 'if the government wishes to seek penalties in excess of those applicable by virtue to [sic] the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment, and must prove those facts to the jury beyond a reasonable doubt.'). *Apprendi thereby expands the range of discrepancies that, under Stirone, will amount to constructive amendments and narrows the list of discrepancies that will be treated as mere variances.*"

Jones v. Smith, 231 F.3d at 1235 (emphasis added).

Subsequent *en banc* Ninth Circuit authority interpreting *Apprendi* renders suspect the vitality of any continued distinction between a constructive amendment or a variance based upon whether the discrepancy between *charge* and *proof* is deemed an "element" of the offense under state law. In *United States v. Buckland,* 2002 WL 857751 (9th Cir., as amended May 7, 2002) (en banc) ("*Buckland*"), the court ruled that *Apprendi* "eschews the distinction between sentencing factors and elements of a crime," and makes the "relevant inquiry . . . not one of form, *but of effect* – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at *4 (citation and internal quotations

omitted; original emphasis). After *Apprendi,* "[t]he days of semantical hair splitting between 'elements of the offense' and 'sentencing factors' . . . are over." *Id.* (citation omitted). The *Buckland* Court expressly overruled prior contrary Ninth Circuit authority. *Id.*

In *Jones v. Smith,* the Ninth Circuit opined that, "[a]fter *Apprendi,* California's treatment of premeditation as a sentencing factor, which was the basis for the California Supreme Court's holding in *People v. Bright,* . . . is open to question." *Id.* at 1236 (footnote omitted). However, the *Jones* Court held that *Apprendi* set forth a "new rule," the retroactive application of which was barred by *Teague v. Lane,* 489 U.S. 288 (1989) because *Teague*'s exception for "watershed" rules did not apply. *Id.* at 1236-38. Thus, the *Jones* Court concluded that the omitted premeditation allegation was merely a "sentencing factor" amounting to a variance subject to harmless error analysis, and that the petitioner had pretrial notice of the premeditation charge sufficient to satisfy the constitution. *Id.* at 1238-39.

In the present case, because the *Apprendi* decision issued prior to the date Petitioner's appeal became final, *Teague* does not bar *Apprendi*'s application. However, as discussed above, the Supreme Court in *Apprendi* declined to decide whether the prosecution in a state court criminal proceeding was constitutionally required to allege in the charging document a fact which increased the potential maximum punishment. Despite dictum in *Jones v. Smith* suggesting an extension of *Apprendi* to the contents of a state court information, there is no "clearly established Federal law, as determined by the Supreme Court of the United States" concerning the required contents of a charging document. *See United States v. Bjorkman,* 270 F.3d 482; 491 (7th Cir. 2001), *pet. for cert. filed,* 70

U.S.L.W. 3497 (Jan. 28, 2002) ("*Apprendi* . . . had nothing to do with the contents of the indictment"; citation omitted); *United States v. Sanchez,* 269 F.3d 1250, 1261 n.16 (11th Cir. 2001) (en banc), *cert. denied,* 122 S. Ct. 1327 (2002) (indictment "not at issue" in *Apprendi*).

Furthermore, no "clearly established" Supreme Court law supports the proposition than an omission from a state charging document constitutes structural error. Fifth Amendment grand jury indictment cases such as *Stirone* indicate that a "constructive amendment" to a grand jury indictment may be *per se* constitutional error. These decisions plainly cannot "clearly establish" law for the present case, where the Fifth Amendment's grand jury provision is inapplicable.

Recent cases cast further doubt upon any suggestion that an omission from a charging document of a factor that could increase the maximum potential punishment constitutes structural error. In *Neder v. United States,* 527 U.S. 1 (1999) ("*Neder*"), involving a prosecution for mail fraud, wire fraud and bank fraud, the Supreme Court held the omission of the element of materiality in a jury instruction was amenable to harmless error analysis. The *Neder* Court explained that such an error "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt and innocence." *Id.* at 9 (original emphasis). Several Courts of Appeal have observed that a federal defendant's right to have a petit jury determine each element of the charged offense beyond a reasonable doubt deemed harmless under *Neder,* is no less important than the defendant's right to have each element of the offense presented to a federal grand jury. *See United States v. Prentiss,* 256 F.3d 971, 984 (10th Cir. 2001) (en banc); *United States v. Bjorkman,* 270 F.3d at 491

(observing that Supreme Court could not have ruled the instructional error harmless in *Neder* if the omission of the element from the charging document deprived the court of jurisdiction or constituted structural error); *see also United States v. Sanchez,* 269 F.3d at 1273 (*Apprendi* error arising from omission of drug quantity from indictment is "analogous to the jury-instruction error in *Neder*"; footnote omitted); *United States v. Mojica-Baez,* 229 F.3d 292, 311 (1st Cir. 2000), *cert. denied,* 532 U.S. 1065 (2001) *and* 532 U.S. 1066 (2001) ("We think that we are compelled by the Supreme Court's decision in *Neder* to subject the indictment error in this case to plain error review."). Recently, in *United States v. Sanchez-Cervantes,* 282 F.3d 664, 670 (9th Cir. 2002), the Ninth Circuit extended *Jones v. Smith*'s *Teague* holding, ruling *Teague* bars the retroactive application of *all* types of *Apprendi* error. In so holding, the court found support in earlier cases holding *Apprendi* error subject to harmless error analysis. *Id.* at 670 & n.28. The court further noted:

> "Our conclusion that *Apprendi* errors do not create a fundamentally unfair trial is supported by the Supreme Court's decision in *Neder.* In that case, the Court held that, unlike a jury instruction that was defective as to all the elements of a crime, an instruction that omitted one element of the offense did not create a structural error. [citation]."

Id., at 670, n.31.[6] At a minimum, *Neder* illustrates the absence of "clearly established" Supreme Court law

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[6] *But see United States v. Du Bo,* 186 F.3d 1177, 1180 & n.2 (9th Cir. 1999) (in *pre-Apprendi* case, where defendant made timely challenge to indictment which entirely omitted *mens rea* element, court declined to apply harmless error analysis, distinguishing *Neder* as a

(Continued on following page)

deeming an omission from a state court information to be structural error.

The *Jones* Court's refusal to deem *Apprendi* a "watershed" rule further supports the conclusion that an omission from a state court charging document can be harmless. The *Jones* Court stated: "the *Apprendi* rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial." *Jones v. Smith,* 231 F.3d at 1238. The *Jones* Court recognized that a fundamentally fair trial could occur even "in the aftermath of a flawed information." *Id.* at 1238. "Where the defendant has actual notice of the nature and cause of the accusation against him, as well as the possible sentences he might receive, the omission of particular key words from the written information neither increases the risk that an innocent person will be convicted nor hinders the fundamental fairness of the trial." *Id.*; *see also United States v. Moss,* 252 F.3d 993, 1000 nn.7, 8 (8th Cir. 2001), *cert. denied,*

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case applicable to petit jury instructions, and indicating that, until the Supreme Court applied *Neder* to the grand jury context or otherwise altered its grand jury jurisprudence, "the rule that a timely challenged indictment that fails to contain elements of a crime requires reversal per se shall remain 'a vital part of our Federal criminal jurisprudence.' [citation]."); *see also United States v. Pernillo-Fuentes,* 252 F.3d 1030, 1032 (9th Cir. 2001) (omission of specific intent allegation from federal indictment charging attempted illegal reentry into United States a "fatal flaw" where specific intent was essential element of crime charged, citing, *inter alia, United States v. Du Bo, supra*); *United States v. Dipentino,* 242 F.3d 1090, 1095-96 (9th Cir. 2001) (declining to decide whether a constructive amendment to federal indictment can be subject to plain error review); *United States v. Shipsey,* 190 F.3d 1081, 1087 (9th Cir. 1999) (same).

122 S.Ct. 848 (2002) (failure to charge drug quantity in indictment does not result in a "fundamentally unfair proceeding" within the meaning of *Teague* exception).[7]

Indeed, more recently, in *Dillard v. Roe,* 244 F.3d 758, 774 (9th Cir.), *cert. denied,* 122 S. Ct. 238 (2001), the Ninth Circuit held that *Apprendi* error, in the form of a failure to submit to the jury two sentence enhancements for personal use of a firearm, was subject to the harmless error standard established in *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) ("*Brecht*") (requiring denial of the habeas petition unless the claimed error had a "substantial or injurious effect or influence in determining the jury's verdict"). The *Dillard* Court relied upon the statement in *Bains v. Cambra,* 204 F.3d 976, 977 (9th Cir.), *cert. denied,* 531 U.S. 1037 (2000), that *Brecht* applied "uniformly in all federal habeas corpus cases under § 2254." *Dillard v. Roe,* 244 F.3d at 744 (finding error not harmless under *Brecht*).[8]

Finally, federal appellate courts presently disagree on the issue of whether, after *Apprendi,* an omission in a *federal* indictment can be subject to review for harmless error or as "plain error" under the federal standard of review for error not preserved below. Most courts of Appeals deem such error susceptible to harmless error or

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[7] Although "[t]he standard for determining whether an error is structural [citation] is not coextensive with the . . . *Teague* exception [for watershed rules]," *see Tyler v. Cain*, 533 U.S. 656, 666-67 (2001), the reasoning of the *Jones* Court that a defendant could receive a fair trial despite an incomplete information demonstrates the amenability of the error to harmless error analysis.

[8] The petitioner in *Dillard v. Roe* did not challenge on appeal the lower court's ruling that preliminary hearing testimony provided the petitioner adequate notice of the enhancements. *Dillard v. Roe,* 244 F.3d at 771 n.17

"plain error" analysis. *See United States v. Mojica-Baez,* 229 F.3d, at 307; *United States v. Thomas,* 274 F.3d 655, 664-71 (2nd Cir. 2001) (en banc) (omission of drug quantity from indictment subject to plain error review; error was plain and affected defendant's substantial rights); *United States v. King,* 272 F. 3d 366, 378-80 (6th Cir. 2001) (failure to allege drug quantity in indictment reviewed for plain error, noting that issue whether the error affected the defendant's substantial rights is "akin to the harmless error analysis employed in preserved error cases"; citation, and internal quotations omitted); *United States v. Nance,* 236 F.3d 820, 825 (7th Cir. 2000), *cert. denied,* 122 S. Ct. 79 (2001); *United States v. Wright,* 248 F.3d 765, 766-67 (8th Cir. 2001) (failure to allege serious bodily injury enhancement in indictment subject to harmless error analysis); *United States v. Prentiss;* 256 F.3d 971, 981-85 (10th Cir. 2001) (en banc); *United States v. Sanchez,* 269 F.3d at 1272-73. Several courts have declined to apply the *per se* reversal standard of *Stirone,* noting that the Supreme Court decided *Stirone* before *Chapman v. California,* 386 U.S. 18 (1967), holding certain constitutional errors could be harmless. *See United States v. Sanchez,* 269 F.3d at 1275 n.48; *McCoy v. United States,* 266 F.3d at 1254.

By contrast, the Fifth Circuit deems such error reversible *per se*. *See United States v. Baptiste,* 264 F.3d 578, 593-95 (5th Cir. 2001) (noting Fifth Circuit's approach had not been "fully consistent"). The Fourth Circuit has held that, under federal "plain error" standard, the omission of the drug quantity from a federal indictment constitutes error "seriously affecting the fairness, integrity and public reputation of the proceedings," opining that to consider the weight of the evidence supporting the drug quantity

enhancement would "usurp" the role of the grand jury and "would result in nothing less than a constructive amendment of the indictment [citation], which itself is reversible plain error. [citation]." *United States v. Cotton,* 261 F.3d 397, 407 (4th Cir. 2001), *cert. granted,* 122 S. Ct. 803 (2002). The Supreme Court's grant of the petition for certiorari in *United States v. Cotton* itself may indicate the absence of any "clearly established" Supreme Court law on the issue whether *Apprendi* error in the form of an omission from an indictment is amenable to harmless error analysis. *See Evans v. Artuz,* 68 F. Supp. 2d 188, 200 (E.D.N.Y. 1999) (fact that United States Supreme Court had granted certiorari on issue showed there existed no "clearly established" Supreme Court law on that issue).

As the foregoing discussion demonstrates, at the time the state court rejected Petitioner's claim, no "clearly established" Supreme Court law: (a) required the state to include in the charging document all allegations which, if proved, could increase the defendant's potential sentence; or (b) forbade harmless error analysis if the state failed to do so. Nothing in *Jones v. Smith* indicates that the panel in that case purported to overrule cases such as *Calderon v. Prunty, Stephens v. Borg, Morrison v. Estelle,* or *Sheppard v. Rees,* all of which ruled that a criminal defendant can obtain constitutionally adequate notice of a charge from a source other than the charging document, and that an omission from an information can be harmless.[9] Therefore, the standards in *Calderon v. Prunty, Stephens v. Borg, Morrison v. Estelle,* and *Sheppard v.*

[9] A panel decision of the Ninth Circuit cannot overrule a prior panel decision. *See Hart v. Massanari,* 266 F.3d 1155, 1171-72 (9th Cir. 2001).

Rees, and *Brecht's* harmless error standard, govern Petitioner's claim. As discussed above, Petitioner received adequate notice of the premeditation allegations. Therefore, the California Court of Appeal's rejection of Petitioner's claim was not contrary to, or an unreasonable application of, any "clearly established" federal laws determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). Accordingly, Petitioner's claim does not warrant habeas relief.

III. Petitioner's Claims of Instructional Error Do Not Warrant Habeas Relief.

A. Standards Governing Claims of Instructional Error

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 68 (1991). "[I]nstructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore v. Taylor,* 508 U.S. 333, 342 (1993) (citation omitted); *see also Dunckhurst v. Deeds,* 859 F.2d 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a ground cognizable in a federal habeas proceeding"; citation omitted). When a federal habeas petitioner challenges the validity of a state jury instruction, the issue is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire,* 502 U.S. at 72; *Spivey v. Rocha,* 194 F.3d 971, 976, (9th Cir. 1999), *cert. denied,* 531 U.S. 995 (2000).

B. The Transferred Intent Instruction Did Not Violate Petitioner's Constitutional Rights.

The trial court instructed the jury on the elements of the crime of attempted murder, and on the meaning of specific intent and premeditation (R.T. 490-93). The court also gave a modified version of California's transferred intent instruction, CALJIC 8.65, instructing the jury that "[w]hen one attempts to kill a certain person, but by mistake or inadvertence injures a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been injured" (C.T. 144; R.T. 493).[10] Although Petitioner's trial counsel did not object to this instruction (*see* R.T. 471-72), on appeal Petitioner asserted the instruction impermissibly allowed the jury to convict Petitioner of the attempted murder of Robert Jimenez, Sr. without finding Petitioner committed the attempted murder with specific intent to kill and with premeditation and deliberation. The Court of Appeal held that, even if the instruction were erroneous, any error was harmless. The Court of Appeal reasoned that the "key issue" in the case was the identity of the shooter, and that, in light of the jury's findings of guilt on both attempted murder charges and the court's instruction to disregard any instruction not applicable to the facts, there was "no reason to believe that the result would have been different had the jury not been given the transferred intent instruction" (Pet. Ex. A, p. 13).

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[10] Unmodified, CALJIC 8.65 provides: "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed."

Petitioner contends the instruction unconstitutionally reduced the prosecution's burden of proof by allowing the jury to convict Petitioner of the premeditated attempted murder of Robert Jimenez, Sr. without finding the requisite specific intent to kill and without finding premeditation (Pet. Mem., pp. 32-34; Trav., p. 17). Petitioner relies upon *People v. Calderon,* 232 Cal. App. 3d 930, 283 Cal. Rptr. 833 (1991) ("*Calderon*"), which held that "where a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated independently as to each victim, and the jury should not be instructed to transfer intent from one to another." *Id.* at 937, 283 Cal. Rptr. at 837 (citation and internal quotations omitted).

In *People v. Calderon, supra,* the defendant fired a shotgun, missing his intended target but hitting a seven-year-old bystander. *Id.* at 933, 283 Cal. Rptr. at 834. The defendant pleaded guilty to two counts of attempted murder. The court held the factual basis for the plea invalid, because the attempted murder of the child was based upon the theory of transferred intent. *Id.* at 935-36, 283 Cal. Rptr. at 836-37. In rejecting application of the transferred intent theory, the court relied upon *People v. Birreuta,* 162 Cal. App. 3d 454, 208 Cal. Rptr. 635 (1984) (*Birreuta*), *overruled on other grounds, People v. Flood,* 18 Cal. 4th 470, 490 n.12, 76 Cal. Rptr. 2d 180, 193, 957 P.2d 869 (1998), and *People v. Czahara,* 203 Cal. App. 3d 1468, 250 Cal. Rptr. 836 (1988), ("*Czahara*").

In *Birreuta,* the defendant was charged with killing two persons: his wife and a neighbor. The defendant's story was that he intentionally shot the neighbor and accidentally also shot defendant's wife. *Birreuta,* 162 Cal. App. 3d at 458, 208 Cal. Rptr. at 637. Stating that the purpose of the transferred intent doctrine was to ensure

that a defendant could not defend against a murder charge by claiming he intended to kill someone else, the court held the doctrine unnecessary in a case where the intended victim also was killed. *Id.* at 459-60, 208 Cal. Rptr. at 638-39. The court reasoned the killer could be punished for his full culpability with respect to the intended death, and could be prosecuted for any accidental deaths according to the culpability associated with those acts. *Id.* at 460, 208 Cal. Rptr. at 639. In *Czahara,* the court extended *Birreuta's* reasoning to a case involving two counts of attempted murder, where no victim was killed. The court held that the purpose of the transferred intent rule "would not be served by convicting a defendant of two or more attempted murders for a single act by which he intended to kill only one person." *Czahara,* 203 Cal. App. 3d at 1474, 250 Cal. Rptr. at 839. Therefore, in *People v. Calderon,* the court held that, because the defendant had committed a completed crime of attempted murder against his intended victim which was "as serious as the greatest level of culpability which could be achieved by transferring that intent to his unintended victim," the doctrine of transferred intent should not apply. *Calderon,* 232 Cal. Rptr. at 936, 283 Cal. Rptr. at 836.

In *People v. Scott,* 14 Cal. 4th 544, 59 Cal. Rptr. 2d 178, 927 P.2d 288 (1996) ("*Scott*"), however, the California Supreme Court held that the doctrine of transferred intent *could* apply where a defendant who killed an unintended victim also was prosecuted for the attempted murder of the intended victim. The Court rejected the notion that the transferred intent doctrine involved any actual "transfer" of the defendant's intent. *Id.* at 551, 59 Cal. Rptr. 2d at 182. Rather, the doctrine "connotes a *policy* – that a defendant who shoots at an intended victim with intent to

kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark." *Id.* (citation omitted). The Court explained that, "[c]ontrary to what its name implies, the transferred intent doctrine does not refer to any actual intent that is 'used up' once it has been employed to convict a defendant of a specific intent crime against an intended victim." *Id.* at 550, 59 Cal. Rptr. 2d at 182.

One of the defendants in *Scott* argued that he was being improperly prosecuted as if he intended to kill two people rather than one, citing *Birreuta, Czahara* and *Calderon. People v. Scott,* 14 Cal. 4th at 551, 59 Cal. Rptr. 2d at 182-83. The California Supreme Court acknowledged that prior cases involving the application of the doctrine to crimes involving both intended and unintended victims, had led to "mixed results," but stated that, "[b]ecause the facts of the case presented here do not involve the fatal shooting of both an intended and unintended victim, we have no occasion to determine whether *Birreuta's* reasoning or its conclusion is correct, and we decline to express a view on that decision." *Id.* at 552, 59 Cal. Rptr. 2d at 183. Rather, consistent with prior case law, "because defendants shot at one person with an intent to kill, missed him, and killed a bystander instead, they may be held accountable for a crime of the same seriousness as the one they would have committed had they hit their intended target." *Id.* at 553, 59 Cal. Rptr. 2d at 183-84.

The *Scott* decision appears to undercut significantly the reasoning in *People v. Calderon.* Yet, in the present case, the Court of Appeal assumed the instruction was error, and held the error harmless. Petitioner and Respondent also assume instructional error. Therefore, this Court

will assume instructional error, *arguendo.* For the reasons discussed below, however, any such error did not deny Petitioner a fair trial or have a "substantial and injurious effect" on the verdict within the meaning of *Brecht.*[11]

As Petitioner points out, the state may not employ evidentiary presumptions in a jury instruction that have the effect of relieving the state of its burden to prove beyond a reasonable doubt every element of the crime charged. *Yates v. Evatt,* 500 U.S. 391, 401 (1991), *disapproved in part on other grounds, Estelle v. McGuire,* 502 U.S. 62, 73 n.4 (1991); *Sandstrom v. Montana,* 442 U.S. 510, 520-24 (1979). "Therefore, an instruction that relieves the state of the burden of proving *mens rea* beyond a reasonable doubt contradicts the presumption of innocence and invades the function of the jury, thereby violating due process." *Keating v. Hood,* 191 F.3d 1053, 1062 (9th Cir. 1999), *cert. denied,* 531 U.S. 824 (2000) (citation omitted).

The transferred intent instruction used in Petitioner's case arguably did not constitute an evidentiary presumption at all, however. *Cf. Suniga v. Bunnell,* 998 F.2d 664, 668 (9th Cir. 1993) (felony-murder instruction is not a presumption of some element of malice-murder, but rather a separate theory of culpability). The instruction also arguably did not omit an element of the crime of premeditated attempted murder. The jury still was required to find the requisite specific intent and premeditation; the challenged instruction simply told the jury that, if the jury found Petitioner harbored the requisite mental state with

[11] The Court does not defer to the Court of Appeal's determination that the error was harmless, but applies *de novo* the harmless error standard set forth in *Brecht. See Bains v. Cambra,* 204 F.3d 964, 976-77 (9th Cir.), *cert. denied,* 531 U.S. 1037 (2000).

respect to a specific person (Peter), it could deem that mental state sufficient to convict Petitioner for the premeditated attempted murder of the second victim (Robert).

Whether understood as an error involving an impermissible presumption concerning intent, or as an error involving an omitted or misstated *mens rea* element, this sort of instructional error typically is amenable to harmless error analysis. *See Neder,* 527 U.S. at 9-10.[12] In *Neder,* the Supreme Court explained that the omission of an element in a jury instruction is amenable to harmless error analysis, for such an error "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt and innocence." *Id.* at 9. The *Neder* Court held the omission was harmless, where the omitted element "was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 17. The Court specifically held that the fact the jury never considered evidence of the omitted element did not violate the right to trial by jury. *Id.* at 17-18.

Neder did not involve an intent element. However, the Supreme Court did apply harmless error analysis to an instruction omitting the intent element of the crime in *California v. Roy,* 519 U.S. 2 (1996). In that case, the trial court had instructed the jury that a person could be convicted of aiding and abetting if the person provided

[12] By contrast, as *Neder* recognized, where the reasonable doubt instruction itself is constitutionally deficient, the error is structural. *See Neder,* 527 U.S. at 8, *discussing Sullivan v. Louisiana,* 508 U.S. 275 (1993). However, *Neder* rejected the argument that *Sullivan v. Louisiana* applied to an instruction's omission of an element of the offense. *Neder,* 527 U.S. at 10-13.

"knowing aid" to the perpetrator. *See Roy v. Gomez,* 81 F.3d 863, 865 (9th Cir.), *rev'd,* 519 U.S. 2 (1996). Following Roy's trial, the California Supreme Court held, in *People v. Beeman,* 35 Cal. 3d 547, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("*Beeman*"), that an aiding and abetting conviction required proof not only of "knowing aid" but also proof that the defendant intended to encourage or faciliate the offense with which the principal was charged. *Roy v. Gomez,* 81 F.3d at 865.

The federal habeas district court held the omission of the specific intent requirement to be harmless error. *Id.* at 865-66. The district court observed that no reasonable juror could have failed to find the requisite intent. *Id.* at 865-66. A divided panel of the Ninth Circuit affirmed. *Id.* at 866. However, an *en banc* court ruled the error was not harmless, applying the standard set forth by Justice Scalia in his concurring opinion in *Carella v. California,* 491 U.S. 263, 270-71 (1989) (Scalia, J., concurring) ("*Carella*"). *Roy v. Gomez,* 81 F.3d at 866-67. *Carella* involved a conclusive presumption relieving the state of its burden of proof with respect to the intent element of embezzlement. Justice Scalia believed that such an error could be harmless only if no rational jury could find the predicate facts forming the basis for the presumption without also finding the presumed fact. *Carella,* 491 U.S. at 271 (Scalia, J., concurring). Under this view, use of such a presumption would be harmless only in those "rare situations" where the reviewing court was confident the error played no part in the jury's verdict. *Id.* at 270 (citation and quotations omitted); *see Roy v. Gomez,* 81 F.3d at 866. Applying this standard, the Ninth Circuit expressed itself unable to say beyond a reasonable doubt that Roy "necessarily" possessed the

requisite intent. *Roy v. Gomez,* 81 F.3d at 867. In the *en banc* court's view, "[w]e are not free to evaluate the evidence and postulate what the jury would have found had it been properly instructed." *Id.* Three judges dissented, arguing that the appropriate standard of review, on habeas, was that set forth in *Brecht. Id.* at 870-71.

The Supreme Court reversed in a *per curiam* opinion, ruling that the Ninth Circuit had erred in failing to apply the *Brecht* standard. *California v. Roy,* 519 U.S. at 5. On remand, the Ninth Circuit deemed the error harmless under *Brecht.* The Court reasoned that, given the jury's finding of "knowing aid," the *Beeman* error had no substantial or injurious effect on the verdict. *See Roy v. Gomez,* 108 F.3d 242, 243 (9th Cir.), *cert. denied,* 522 U.S. 876 (1997).

Neder and *California v. Roy* demonstrate that the giving of the allegedly erroneous transferred intent instruction in Petitioner's case is subject to harmless error analysis. *See also Spicer v. Gregoire,* 194 F.3d 1006, 1008-09 (9th Cir. 1999) (assuming jury instruction erroneously relieved prosecution of burden of proving rape's "forcible compulsion" element, error harmless because, *inter alia,* evidence was such that jury would not "have come to a different verdict even if the court had given a proper instruction"). In the present case, the verdict shows the jury rejected Petitioner's defenses of alibi and mistaken identity, and believed the prosecution's evidence showing Petitioner was the shooter. Such evidence also showed: (1) Petitioner fired multiple times at Peter from a distance of approximately ten to fifteen feet, causing Peter to fall to the floor; (2) Robert entered the room, bent down to retrieve the phone from Peter, then rose and began to turn; (3) Petitioner then fired a new series of multiple

shots, these shots directed not toward the prone Peter, but toward the standing Robert; and (4) a bullet hit Robert in the chest. Petitioner does not contend the evidence did not suffice to show the willful, premeditated attempted murder of Peter. On this evidence, the jury that convicted Petitioner of the willful, premeditated attempted murder of Peter undoubtedly believed Petitioner acted with the same quality of intent in firing the second series of shots in such a manner as to hit a standing victim in the chest. *See People v. Orabuena*, 56 Cal. App. 3d 540, 545, 128 Cal. Rptr. 474, 476 (1976) ("When a murder occurs during an attack upon a group, a defendant's intent to kill need not be directed at any one individual, it is enough if the premeditation is directed at the group."); *see also People v. Vang*, 87 Cal. App. 4th 554, 563-64, 104 Cal. Rptr. 2d 704, 710-11 (2001) (evidence sufficient to show defendants harbored specific intent to kill every person in target residences, even if defendants could not see all of their victims at the time of the shootings; "[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up"; citations omitted); *People v. Chinchilla*, 52 Cal. App. 4th 683, 690-91, 60 Cal. Rptr. 2d 761, 766 (1997) (defendant who fired one shot at two victims, one of whom was crouched in front of the other, properly convicted of two counts of attempted murder); *People v. Gutierrez*, 14 Cal. App. 4th 1425, 1436-37 (1993) (defendant who fired five shots at close range from moving vehicle at three individuals intended to kill

all three). Therefore, any error in giving the "transferred intent" instruction was harmless.[13]

C. The Court's Use of CALJIC 2.03 Did Not Prejudice Petitioner.

Over a defense objection, the court gave CALJIC 2.03, instructing the jury that:

> "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight

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[13] Petitioner insists that the transferred intent theory constituted the prosecutor's sole theory of culpability with respect to the attempted murder of Robert (Pet. Mem., pp. 33-34; Trav., p. 18). Thus, Petitioner does not argue directly any error based upon the potential submission to the jury of alternative theories of culpability. Any such inchoate argument could not transform the alleged non-structural error into a structural one. As discussed above, *Neder* and *California v. Roy* "clearly establish" that harmless error analysis is required in cases in which a jury instruction omits the requisite mental state. It would make little sense to deem the same instructional omission not susceptible of harmless error analysis merely because the omission is accompanied by other, proper instructions regarding a valid, alternative theory of culpability. *Cf. Keating v. Hood,* 191 F.3d at 1064-65 n.17 (acknowledging unresolved "tension" between *California v. Roy,* and cases like *Stromberg v. California,* 283 U.S. 359 (1931)); *see also Quigley v. Vose,* 834 F.2d 14, 16 (1st Cir. 1987) (*Sandstrom* error subject to harmless error analysis; rejecting as "plainly wrong" the petitioner's "strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue," the error was "somehow more pernicious than . . . where the *only* charge on the critical issue was a mistaken one"; citation omitted). In any event, no Supreme Court law "clearly establishes" that the kind of error that allegedly occurred in the present case is structural error.

and significance, if any, are for you to decide." (C.T. 115; R.T. 481).

Although Petitioner's counsel argued there was no evidence showing Petitioner made any willfully false or deliberately misleading statement concerning the charged crimes, the prosecutor argued: "I would submit based on the defendant's testimony that he wasn't at the location of the crime." (R.T. 467-68). The court overruled the objection (R.T. 468).

The Court of Appeal deemed harmless any error in giving CALJIC 2.03, because the instruction indicated that the jury could consider the evidence but that the evidence was insufficient by itself to prove guilt (Pet. Ex. A, p. 14). The Court of Appeal rejected Petitioner's claim that CALJIC 2.03 impermissibly lessened the prosecution's burden of proof (Pet. Ex. A, p. 14).

CALJIC 2.03 "has nothing to do with a defendant's trial testimony, but rather focuses on defendant's *pretrial* statements." *People v. Turner,* 8 Cal. 4th 137, 202, 32 Cal. Rptr. 2d 762, 878 P.2d 521 (1994), *cert. denied,* 514 U.S. 1068 (1995) (original emphasis). Petitioner asserts the instruction prejudicially lessened the prosecution's burden of proof by permitting the jury to infer consciousness of guilt from Petitioner's *trial* testimony (Trav., p. 20). However, assuming, *arguendo,* there was no evidence to support the instruction, any such error did not render Petitioner's trial unfair or produce a "substantial and injurious effect" upon the verdict.[14]

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[14] Respondent concedes an absence of evidence to support the instruction (*see* Resp. Mem., p. 17). Yet, Petitioner testified that, on January 27, Petitioner told an interviewing police officer "this will all

(Continued on following page)

CALJIC 2.03 does not assume the existence of evidence of a prior false statement; it "merely instruct[s] the jury on the use of such evidence should it be found to exist." *People v. Crandell,* 46 Cal. 3d 833, 870, 251 Cal. Rptr. 227, 246, 760 P.2d 423 (1988). In any event, the Ninth Circuit has rejected the argument that CALJIC 2.03 unconstitutionally permits the jury to use prior false statements as evidence of guilt. *See Turner v. Marshall*, 63 F.3d 807, 820 (9th Cir. 1995), *overruled on other grounds, Tolbert v. Page,* 182 F.3d 677, 685 (9th Cir. 1999); *cf. United States v. Perkins,* 937 F.2d 1397, 1401-02 (9th Cir. 1991) (upholding similar federal instruction).

Moreover, any error could not have prejudiced Petitioner. In addition to CALJIC 2.03, the court gave CALJIC 2.21.2, stating: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars" (R.T. 483; C.T. 121). In light of this instruction, if the jury determined Petitioner testified falsely at *trial*, it is not reasonably likely the jury would have applied *CALJIC 2.03* in evaluating Petitioner's trial testimony; rather, the jury (properly) would have applied *CALJIC 2.21.2.* Petitioner does not challenge the court's use of CALJIC 2.21.2, an instruction recently upheld in *Turner v. Calderon,* 281 F.3d 851, 865-66 (9th Cir. 2002). In short, although CALJIC 2.03 may have been unnecessary, it did not deprive

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clear up" and "they [the victims] are my buddies." Arguably, such pretrial statements could support an inference Petitioner was attempting falsely to exculpate himself during the interview.

petitioner of a fair trial, *see Estelle v. McGuire,* 502 U.S. at 72, nor did it have had a "substantial or injurious effect" upon the verdict. *See Brecht,* 507 U.S. at 637.

IV. Petitioner's Claims of Juror Misconduct Do Not Warrant Habeas Relief.

A. Factual Background

In pretrial proceedings out of the presence of the jury, the prosecutor informed the court: "We have a juror problem" (R.T. 37). The bailiff said Juror No. 9 reportedly had recognized some of the witnesses, and had asked to speak to the court (R.T. 38). Upon inquiry by the court, Juror No. 9 stated he knew Robert Jimenez, Sr. because Juror No. 9 had coached Robert's son in Pony League Baseball (R.T. 39). Juror No. 9 said he knew the son, although "we are not real close or anything," but "[t]he dad I don't really know" (R.T. 39-40). When the court asked Juror No. 9 if the fact that he recognized Robert Jimenez, Sr. caused the juror to believe he could not be impartial, the juror replied: "Not without the proof, your Honor. It wouldn't bother me one bit." (R.T. 40). Juror No. 9 said he had no concern about being a juror in a case where he might be acquainted with one of the witnesses (R.T. 40). Petitioner's counsel declined the court's invitation to question Juror No. 9, saying "I think we're satisfied" (R.T. 40-41). Petitioner's counsel further told the court counsel had discussed the matter with Petitioner, and Petitioner was satisfied with Juror No. 9's ability to be fair and impartial (R.T. 41). Hence, Petitioner neither challenged Juror No. 9 for cause nor used a peremptory challenge to strike Juror No. 9.

Following the verdict, the court ordered sealed the record of personal juror information, including the jurors' names and addresses (R.T. 546). Thereafter, at a hearing on December 2, 1998, Petitioner's counsel sought to obtain juror identification information with respect to three jurors, including Juror No. 9 (R.T. 562-63; C.T. 273).[15] Petitioner's counsel stated Petitioner's mother and brother reportedly had observed Juror No. 9 talking in the hallway with "Mr. Jimenez, Sr.," identified as the "victim's father," before the verdict was announced (R.T. 567). The prosecutor opposed the motion, arguing "concern for the well-being of jurors" if the information were released, because the defendant was "still making threats against the lives of the victims in this matter, and did so in my presence during the last proceeding in which the matter was before this Court" (R.T. 569). Petitioner's counsel disputed the existence of such threats, and said any juror information would be released only to counsel and the defense investigator (R.T. 570). The court denied the request, commenting that Petitioner's friends and relatives were not unbiased, and that Petitioner had shown no facts to support a claim of jury misconduct (R.T. 565-571).

On January 8, 1999, Petitioner's counsel filed a motion for a new trial, asserting, *inter alia,* juror misconduct (C.T. 275-76). Counsel also renewed his request for the release of juror information (C.T. 275-76). In a declaration, Petitioner's counsel indicated that, after the jury had

[15] The petition seeking release of juror information is not in the record. The petition sought the release of juror information with respect to Juror No. 9, the juror whom Petitioner's mother allegedly heard asking about the bulge in Petitioner's back, and the foreperson (R.T. 564).

returned its verdicts, Petitioner's mother told counsel that a family member had observed Juror No. 9 talking to "Mr. Jimenez, Sr." before the jury came back with its verdicts (C.T. 277-78). Counsel indicated the family member concerned was not Petitioner's brother, but rather Petitioner's nephew (C.T. 277). Also attached to the motion was the declaration of Adrian Martinez, Petitioner's nephew (C.T. 279-80). This declaration stated that, in November 1998, during a break in the proceedings at Petitioner's trial "a day or two before the verdicts were announced," Martinez observed Juror No. 9, whom Adrian Martinez knew to be Mike Serrano, talking to "Mr. Jimenez, Sr.," the father of Robert and Peter, in the courtroom hallway (C.T. 279).[16] According to Adrian Martinez, this conversation lasted about five minutes (C.T. 279). On January 27, 1999, Petitioner's counsel filed another declaration of Adrian Martinez, in which Martinez stated that, on the same date he observed Juror No. 9 talking to "Mr. Jimenez, Sr.," Martinez also observed the same juror speak briefly with Robert Jimenez (C.T. 291-92).

On February 22, 1999, the court held another hearing concerning the alleged contact with Juror No. 9 (R.T. 576-77). Petitioner called Robert Jimenez, who testified that Juror No. 9, Mike Serrano, had coached his son about three or four years before (R.T. 578). Jimenez said he last had talked with Serrano about three or four years ago, and

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[16] The jury rendered its verdict in Petitioner's trial on October 20, 1998 (R.T. 535-45; C.T. 99-100, 230-36). The court trial on the prior conviction allegations occurred on October 22, 1998 (R.T. 553-58; C.T. 247-28). The record indicates that only proceeding occurring in November of 1998 was a brief proceeding in which the court granted a defense motion to continue the sentencing hearing and set a hearing on the motion for juror information for December 2, 1998 (C.T. 271).

denied having any telephone contact with Serrano during the trial (R.T. 578-79).

Petitioner then called John Eric Ruise, who testified he grew up with Robert Jimenez and Petitioner (R.T. 581). Ruise testified that, during Petitioner's trial, Ruise was at the Jimenez house when "[s]omebody answered the phone" for Robert Jimenez (R.T. 583). Ruise claimed he overheard a telephone conversation in which Robert Jimenez described the shooting incident involving Petitioner (R.T. 583-86). According to Ruise, the call lasted about ten minutes (R.T. 583). Ruise claimed Ruise asked Jimenez who had made the call, and Jimenez told Ruise, the caller was Mike Serrano (R.T. 600). Ruise said he asked Robert. Jimenez if the telephone discussion were "legal," and Jimenez replied that he was not really sure (R.T. 584-85). According to Ruise, when Ruise asked Jimenez if Jimenez had a "ringer" on the jury, Jimenez did not say anything, but "just smiled" (R.T. 585).

On cross-examination, Ruise testified that, on the day of the telephone call, Ruise was at the Jimenez home playing darts with "Larry" and another friend (R.T. 592). Ruise said he thought "one of the girls there" had taken the call, and "[t]hey called [Robert] to the phone" (R.T. 592-93). Ruise said he, his son, and "Larry" were in the room with the phone, but then said he was in an adjoining room with no door between the two rooms (R.T. 593). According to Ruise, Robert Jimenez took the call and described the shooting, talking "fairly loud" (R.T. 599).

Ruise testified that the trial had occurred "a few months ago" (R.T. 587-89). Ruise said the trial had lasted a year, and had been going on over the New Year's holiday (R.T. 589, 591-92). Ruise gave further inconsistent

testimony that the telephone call had occurred: (1) after the summer when it was "kind of cold"; (2) before the summer; (3) a couple of months after Thanksgiving; and (4) approximately six months before the February 1999 hearing at which Raise was testifying (R.T. 600-02). As indicated previously, Petitioner's first trial began and ended in a mistrial on June 8, 1998, the second trial began on June 9, 1998 and ended in a mistrial on June 15, 1998, and the third trial commenced on October 5, 1998 and ended in a verdict on October 20, 1998 (C.T. 62, 70, 79, 99-100, 230-36). Ruise admitted suffering prior felony convictions for burglary, armed robbery, and "GTA" (grand theft auto) (R.T. 587-89).

Petitioner then called Daniel Jimenez, the father of Robert Jimenez, who testified that he knew Mike Serrano by sight as his grandson's Pony League coach, and that he had "never" had any contact or conversation with Serrano during the trial (R.T. 607-09). Petitioner offered to call Adrian Martinez, but the court said it was unnecessary to do so, because the court already had Adrian Martinez' declaration, and "it says what it says" (R.T. 609-10).

Petitioner's counsel argued he had presented sufficient evidence to warrant the release of Juror No. 9's address and telephone number (R.T. 611). The court ruled there was "nothing of substance that demonstrates any inappropriate, contact by anyone with Mr. Serrano during the course of trial" (R.T. 613). The court indicated that, despite the declaration of Adrian Martinez and Ruise's testimony, the court had no reason to believe Mr. Serrano did not adhere to the court's instructions not to discuss the case with anyone during the trial, and specifically found Ruise's testimony not credible (R.T. 613-14).

At a subsequent hearing on Petitioner's motion for a new trial, the court indicated for the record that Serrano had contacted the court and "advised the Court in no uncertain terms that he did not consent to and desired not to have his personal identifying information released" (R.T. 618-19). Thereafter, with respect to Petitioner's motion for a new trial on the ground of jury misconduct, Petitioner's counsel stated:

> "I believe there was juror misconduct. We supplied various declarations on that issue. I feel that there was juror misconduct in this case, however, we haven't been able to prove it completely because we haven't been able to talk to any of the jurors about it. So far, we have been able to reach three of them through various investigative techniques. None of them have been willing to discuss this case. I feel it's appropriate for the Court to give us some juror identifying information.
>
> We have gone through this. I know the Court has made rulings and feels there was no juror misconduct in this case and that's our third ground until that [sic]. We'll submit on the points and authorities."

(R.T. 619-20). The court agreed that the issue had been dealt with previously, stating: "The Court has ruled and the Court believes that its previous rulings are appropriate with respect to these issues." (R.T. 620).

B. Petitioner's Contentions

Petitioner contends "the available evidence clearly showed that Juror No. 9, Mike Serrano, engaged in serious misconduct when he contacted the victims during the

course of trial" (Pet. Mem., p. 25). Petitioner also contends these alleged improper contacts show Serrano concealed during voir dire the extent of his relationship with the Jimenez family (Trav., p. 14). Petitioner condemns as unreasonable the trial court's determination that Ruise was not a credible witness (Pet. Mem., pp. 27-28; Trav., pp. 12-14).

Elsewhere, Petitioner retreats from his position that the record shows actual misconduct, asserting rather that "it appears as though misconduct occurred" (Pet. Mem., p. 28) and Serrano "may have had improper contact" with a member of the Jimenez family (Trav., p. 14). Petitioner contends he "has been unable to gather additional evidence regarding the extent of Juror No. 9's contacts with the victims and/or the true nature of his relationship with the victims" (Trav., p. 14). Petitioner requests an evidentiary hearing, citing 28 U.S.C. section 2254(e)(2), on the ground "Petitioner was precluded from further developing his claim by the state court's refusal to release any information about the jurors or order a hearing where Juror No. 9 would be required to testify" (Trav., p. 14).

C. Discussion

The Sixth Amendment guarantees a criminal defendant a verdict by a fair and impartial jury. *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968); *Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir.), *cert. denied,* 525 U.S. 1033 (1998). "The bias or prejudice of even a single juror" violates a defendant's right to a fair trial. *Dyer v. Calderon,* 151 F.3d at 973 (citation omitted).

"Actual bias against a defendant on a juror's part is sufficient to taint an entire trial." *Green v. White,* 232 F.3d

671, 676 (9th Cir. 2000) (citation omitted); *see generally McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548 (1984). "In extraordinary circumstances, courts may presume bias based on the circumstances." *Green v. White,* 232 F.3d at 676 (citation and internal quotations omitted) (juror's lies during voir dire, as well as his subsequent statements that juror knew defendant was guilty and wanted to kill defendant himself, and juror's boasts to other jurors that he investigated crimes for crime victims, sufficed to show bias); *Dyer v. Calderon,* 151 F.3d at 984-85 (bias presumed where juror lied materially and repeatedly on voir dire in order to conceal information which, if revealed, would have kept her off the jury).

Additionally, jury exposure to facts not in evidence can violate the Sixth Amendment. *See Lawson v. Borg,* 60 F.3d 608, 612 (9th Cir. 1995); *Dickson v. Sullivan,* 849 F.2d 403, 405 (9th Cir. 1998). Petitioner's allegation that Robert Jimenez described the crime to Serrano in a telephone call during the trial suffices to *allege* that at least one juror, Serrano, received extrinsic facts not in evidence. *See Mancuso v. Oliverez,* 282 F.3d 728 (9th Cir. 2002) ("A juror's personal knowledge of specific information concerning the defendant or the defendant's alleged crime constitutes impermissible extrinsic evidence. [citations]."); *Lawson v. Borg,* 60 F.3d at 614 (receipt of extrinsic evidence by one juror can deprive the defendant of an "unprejudiced, unanimous verdict"; citations omitted).

The claim of concealment of information on voir dire is analyzed separately from the extrinsic information claim. *E.g., Fields v. Woodford,* 281 F.3d 963, 975 (9th Cir. 2002); *United States v. Saya,* 247 F.3d 929, 935-39 (9th Cir. 2001), *cert. denied,* 122 S. Ct. 493 (2001). However, Petitioner's claim that Serrano concealed the extent of his relationship

with the Jimenez family on voir dire is premised solely upon Petitioner's allegations of the two improper contacts with Daniel and Robert Jimenez at trial, and hence, stands or falls on Petitioner's proof that those alleged contacts occurred. Any contention that Serrano received extrinsic information from either Daniel or Robert Jimenez also is based upon the truth of the allegations that those contacts actually occurred. As indicated above, the trial court found, as a matter of fact, that the improper contacts did not occur.

To obtain relief on a claim of juror bias based upon alleged juror concealment or misrepresentation on voir dire, a defendant must show that the juror failed to answer honestly a material question on voir dire, and that a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. at 556; *Fields v. Woodford,* 281 F.3d at 971 (citation omitted). Proof that the juror in question did not lie or conceal any information on voir dire renders "further inquiry . . . academic." *Martinez v. Food City, Inc.,* 658 F.2d 369, 374-75 (5th Cir. 1981).

Similarly, when a defendant challenges a juror's reception of extrinsic information, the defendant must, "as a threshold matter, make a showing that the juror actually received . . . the information." *United States v. Plunk,* 153 F.3d 1011, 1025 & n.12 (9th Cir. 1998), *amended,* 161 F.3d 1195 (9th Cir. 1998), *cert. denied,* 526 U.S. 1060 (1999), *abrogated on other grounds, United States v. Hankey,* 203 F.3d 1160, 1169 n.7 (9th Cir.), *cert. denied,* 530 U.S. 1268 (2000). Where the jury is not exposed to any prejudicial information, "*a fortiori,* there [is] no constitutional error." *Burks v. Borg,* 27 F.3d 1424, 1432 n.6 (9th Cir. 1994), *cert. denied,* 513 U.S. 1095, 1160 (1995); *see also United States*

v. Console, 13 F.3d 641, 669 (3d Cir. 1993), *cert. denied,* 511 U.S. 1076 (1994) and 513 U.S. 812 (1994) (where district court found not credible one juror's allegation that other jurors were reading newspaper accounts of the case, court was not required to inquire further into the effect of any such exposure on the verdict).

The question of the partiality of a particular juror is "plainly one of historical fact," such that state court findings on the question are entitled to deference on habeas review. *Patton v. Yount,* 467 U.S. 1025, 1036 (1984); *Tinsley v. Borg,* 895 F.2d 520, 525 (1990), *cert. denied,* 498 U.S. 1091 (1991); *see also Thompson v. Keohane,* 516 U.S. 99, 111 (1995). Additionally, "[t]he extent, if at all, to which the jurors saw or discussed extrinsic evidence . . . is a question of historical fact as to which the state court's findings are entitled to a presumption of correctness." *Burks v. Borg,* 27 F.3d at 1432 (citations, internal quotations and brackets omitted). As Respondent points out, to obtain habeas relief on his juror misconduct claim, Petitioner must show the state court's decision was based upon an "unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d)(2). On federal habeas corpus, a state court's determinations of fact must be presumed correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). A federal habeas court has "no license to redetermine credibility of witnesses whose demeanor has been observed by the trial court, but not by them. *Marshall v. Lonberger,* 459 U.S. 422, 434 (1983); *see also Ortiz v. Stewart,* 149 F.3d 923, 936 (9th Cir. 1998), *cert. denied,* 526 U.S. 1123 (1999); cf. *Fields v. Woodford,* 281 F.3d at 974 (remanding for evidentiary hearing on claim that juror allegedly gave

false or misleading information on voir dire, where "there was no credibility determination as to which we owe deference").

Petitioner has come forward with no evidence to rebut the presumption of correctness accorded to the state court's factual findings and credibility determinations. In light of the testimony of Daniel and Robert Jimenez, the trial court's determination that the alleged improper contacts between these witnesses and Serrano never occurred cannot be deemed "unreasonable in light of the evidence presented in the State court proceedings." Therefore, the trial court's finding that no improper contacts occurred stands unrebutted.

As indicated above, Petitioner contends this Court should conduct an evidentiary hearing, because the trial court allegedly prevented Petitioner from "further developing his claim" when it denied Petitioner access to juror information (Trav., p. 14). Petitioner cites 28 U.S.C. section 2254(e)(2) (id.). Under section 2254(e)(2), a federal habeas court's authority to hold an evidentiary hearing is subject to certain limitations if the habeas petitioner "failed to develop the factual basis of a claim in State court proceedings. . . ." A habeas petitioner is not subject to the limitations of section 2254(e)(2) if the state courts rebuffed the petitioner's efforts to "develop the factual basis of a claim." *See Williams v. Taylor,* 529 U.S. 420, 440-43 (2000) (section 2254(e)(2) inapplicable where state courts refused to allow state habeas counsel to investigate or conduct discovery on claim of juror bias). However, section 2254(e)(2) does not mandate an evidentiary hearing in every instance where the state courts prevented a petitioner from developing the factual basis for his or her claim. *See McDonald v. Johnson,* 139 F.3d 1056, 1060 (5th Cir. 1998) ("[section] 2254(e)(2)

specifies the situations where evidentiary hearings are allowed, not where they are required"). Even assuming Petitioner did not "fail to develop" his claim in the state court, Petitioner "is entitled to an evidentiary hearing only if: (1) the *allegations* in his petition would, if proved, entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." *Phillips v. Woodford,* 267 F.3d 966, 973 (9th Cir. 2001) (citations omitted; original emphasis). Moreover, "[t]o warrant setting aside the presumption of correctness, facts left undeveloped by the state court must be material [citation], not trivial or tangential to the issue presented." *Dyer v. Calderon,* 151 F.3d at 976. "What this means is that the evidence not discovered (that an adequate hearing *would* have discovered) must be so significant that a reasonable fact-finder could have decided the [juror] bias question differently if armed with this knowledge. In other words, there must be a material possibility that the judge would have made a different decision if he had been aware of the facts in question." *Id.* (original emphasis).

Petitioner has not alleged any material fact, undeveloped in the state court proceedings, which, if proved, would show Petitioner's entitlement to habeas relief. Petitioner only alleges that he was unable to locate Serrano; Petitioner does not allege Serrano, once located, would testify to any alleged bias or improper contacts. *See Gandarela v. Johnson,* 286 F.3d 1080, 1987 (9th Cir. 2001) (evidentiary hearing properly denied where the petitioner "failed to show what more an evidentiary hearing might reveal of material import. . . ."); *Tinsley v. Borg,* 895 F.2d at 530 (district court did not err in refusing to conduct evidentiary hearing on claim that juror introduced extrinsic evidence into jury deliberations; because petition did

not allege juror actually introduced any extrinsic information, petitioner failed to "establish the first prong of the test for when an evidentiary hearing is required: he has failed to provide allegations which, if proved, would establish his right to relief"). Moreover, beyond the basis rejected by the state court, Petitioner does not have any non-speculative basis for alleging that to which Serrano actually would testify.

Furthermore, Petitioner has not shown the inadequacy or unfairness of the state court proceedings. Under California law, a juror has "an absolute right to discuss or not to discuss the deliberation or verdict with anyone." Cal. Civ. Proc. Code § 206(a). Section 237(a)(2) of the California Code of Civil Procedure provides that, following the recording of a jury verdict in a criminal proceeding, juror identifying information, in the form of names, addresses and telephone numbers, "shall be sealed until further order of the court as provided by this section." "Any person" may petition the court for access to these records, by filing a petition "supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." Cal. Civ. Proc. Code § 237(b). If the court deems the petition sufficient to set forth a "prima facie showing of good cause for the release of the personal juror identifying information," the court may set the matter for hearing. Cal. Proc. Code § 237(b).[17] California Code of Civil Procedure section 206(g) provides that, following the recording of a verdict in criminal proceedings, and pursuant to

[17] In the present case, the state court elected to conduct a hearing even though the court found Petitioner had failed to make a "prima facie showing of the need for juror information" (R.T. 563).

section 237, the defendant or defendant's counsel may petition the court for access to personal juror identifying information necessary for the defendant to communicate with jurors "for the purpose of developing a motion for a new trial or any other lawful purpose." Cal. Civ. Proc. Code § 206(g). The showing required by section 206(g) is the same as the "good cause" showing required by section 237. *See People v. Duran,* 50 Cal. App. 4th 103, 121, 57 Cal. Rptr. 2d 635, 646 (1996); *People v. Granish,* 41 Cal. App. 4th 1117, 1128, 1131, 49 Cal. Rptr. 2d 45, 53-54 (1996) (holding defendant failed to make required showing to warrant release of juror information where accusations of juror misconduct "were raised solely by defendant's friends and relatives" and the claimed misconduct was "wholly speculative at best").

Sections 206 and 237 "maximize juror privacy and safety, while retaining a criminal defendant's ability to contact jurors after the trial if sufficient need is shown." *Townsel v. Superior Court,* 20 Cal. 4th 1084, 1087, 86 Cal. Rptr. 2d 602, 603, 979 P.2d 963 (1999). "A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict." *People v. Cox,* 53 Cal. 3d 618, 698-99, 280 Cal. Rptr. 692, 741, 809 P.2d 351 (1991); *see also Townsel v. Superior Court,* 20 Cal. 4th at 1092-93, 86 Cal. Rptr. 2d at 607.

Petitioner does not argue California's statutory procedure limiting post-trial access to juror identifying information is "arbitrary" or "disproportionate to the purposes" it was designed to serve. *See United States v. Scheffer,* 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. [citations]. A defendant's

interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.' [citations]. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' [citations].") (footnote omitted). No "clearly established" Supreme Court law forbids a state from protecting jurors in the fashion provided in the California Code of Civil Procedure. In fact, the United States Supreme Court has indicated a court could disregard a juror affidavit obtained in violation of a court order denying a motion for leave to conduct post-verdict juror interviews. *See Tanner v. United States,* 483 U.S. 107, 126 (1987) ("*Tanner*"). In *Tanner,* the Court held the Sixth Amendment did not require a court to conduct an evidentiary hearing at which jurors would testify concerning alleged juror intoxication during deliberations. *Id.* at 127. The Court stated that a defendant's Sixth Amendment interests were protected by other aspects of the trial process, including voir dire, juror's ability to report inappropriate juror behavior during the trial, and a party's ability, post-trial, "to impeach the verdict by *nonjuror* evidence of misconduct." *Id.* (emphasis added).

Many courts, including this one, have declined to release juror identifying information absent a showing of good cause. *See United States v. Hooshmand,* 931 F.2d 725, 737 (11th Cir. 1991) (rejecting claim that district court's local rule prohibiting post-trial contact with jurors absent a court order upon a showing of good cause violated First

and Sixth Amendments); *United States v. Griek*, 920 F.2d 840, 843 (11th Cir. 1991) (rejecting First Amendment challenge to same local rule); *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988) (upholding denial of defendant's request to conduct post-trial interviews of jurors, where defendant made no threshold showing of improper outside influence; "[w]ithout a threshold showing of improper outside influence, defendant's request is a mere fishing expedition"); *Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019, 1021-22 (5th Cir. 1984) ("We have . . . uniformly refused to upset the denial of leave to interview jurors for the purpose of obtaining evidence of improprieties in the deliberations unless specific evidence of misconduct was shown by testimony or affidavit"; upholding constitutionality of local rule requiring good cause to conduct juror interviews); *United States v. Barshov*, 733 F.2d 842, 851-52 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (affirming district court's denial of defendants' motion to interview jurors to determine whether juror's son had brought extraneous information to jury's attention during trial, where defendants' affidavits contained no evidence showing any improper discussion between jurors and juror's son); *Sussman v. UNUM Provident Corp.*, 2001 WL 1352789 at *3 n.1 (C.D. Cal., Oct. 30, 2001) ("While interviewing jurors immediately after a verdict is proper, an intrusion into the juror's privacy days after the end of the trial may be inappropriate if there is no preliminary showing of good cause. [citation]"); *Marshall v. Hendricks*, 103 F. Supp. 2d 749, 799-800 (D.N.J. 2000) (upholding constitutionality of state statute authorizing postverdict juror contact only upon a showing of good cause); *Economou v. Little*, 850 F. Supp. 849, 853 n.3 (N.D. Cal. 1994) (denying defendants' request for the release of jurors' names, addresses and

telephone numbers, where defendants had failed to make any preliminary showing that jury received extraneous prejudicial information or was the subject of any improper outside influence; "[]an intrusion into the privacy of the jurors' addresses and telephone numbers weeks after the conclusion of the trial is inappropriate where there has been no preliminary showing of juror misconduct"); *see also* Benjamin M. Lawsky, *Limitations on Attorney Post Verdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant,* 94 Col. L. Rev. 1950, 1956 & n.43 (1994) (identifying eighteen federal local court rules requiring a showing of good cause to conduct juror interviews); James R. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond,* 65 St. John's L. Rev. 389, 435 (1991) (noting "[m]any courts have adopted rules restricting postverdict contact with jurors," which rules "have been upheld by the federal appellate courts"; footnotes omitted).

Nor does Petitioner challenge the adequacy or fairness of the hearing on Petitioner's initial motion to obtain the release of juror information. Petitioner does not complain the court unfairly restricted his ability to present evidence to meet his burden of showing "good cause" for the release of juror information. Notably, Petitioner does not claim the court prevented Petitioner from obtaining statements or testimony from any juror whom the defense could locate. Nor did the court prevent Petitioner from presenting evidence from other persons who might have observed the alleged contact between Daniel Jimenez and Serrano (which supposedly occurred in the hallway of a public courthouse), or from the "girl" at the Jimenez house who allegedly took the telephone call from Serrano, or from Ruise's son or "Larry," whom Ruise claimed were in the

room with Ruise at the time Robert Jimenez supposedly spoke on the telephone to Serrano in a "fairly loud" voice, or from any other person with knowledge of Serrano's alleged prior relationship with the Jimenez family. Petitioner simply claims the court erred in finding that Petitioner had failed to show "good cause" to warrant release of juror information, a determination based upon credibility findings which cannot be disturbed in these habeas proceedings.

Petitioner's argument for an evidentiary hearing reduces to the contention that the new trial motion proceedings were inadequate solely because the court's prior order prevented Petitioner from locating jurors, principally Serrano. "A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances. [citations]." *Dyer v. Calderon,* 151 F.3d at 974. However, due process requires only that all parties be represented and that any investigation be "reasonably calculated to resolve the doubts raised about the juror's impartiality." *Dyer v. Calderon,* 151 F.3d at 974-75 (citations omitted). Thus, a hearing need not be a "full-blown" evidentiary hearing. *See United States v. Diane,* 62 F.3d 1180, 1192 (9th Cir. 1995), *cert. denied,* 519 U.S. 931 (1996) (trial court vested with considerable discretion in determining whether to hold a hearing on allegations of jury bias and in defining nature and extent of hearing); *United States v. Caro-Quintero,* 769 F. Supp. 1564, 1570 (C.D. Cal. 1991), *aff'd,* 42 F.3d 1402 (9th Cir. 1994) (unpublished disposition) (although "[n]ot every allegation that extraneous information has reached the jury requires a full-dress hearing, . . . [a] court must hold an evidentiary hearing to determine the precise nature of the extraneous information which actually made it to the jury when it is

unclear exactly what may have come before the jury.") *Id.* "So long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation are entitled to a presumption of correctness." *Dyer v. Calderon,* 151 F.3d at 974 (citation omitted).

Petitioner's hearing on the motion for a new trial on the ground of juror misconduct may have been brief, but that was because Petitioner's counsel relied upon the prior evidence offered at the hearing on the motion for release of juror information. The court indicated it was denying the motion for a new trial on the basis of its previous determination, made after a full and fair evidentiary hearing, that the alleged improper contacts between Serrano and Daniel and Robert Jimenez simply had not occurred. As indicated above, this conclusion stands unrebutted in these habeas proceedings.

See Tinsley v. Borg, 895 F.2d at 525-26 (deferring to state court's implied finding juror was not biased). Hence, Petitioner has neither rebutted the presumption of correctness accorded to the trial court's determination, shown that determination to have been unreasonable, nor shown entitlement to another evidentiary hearing in this Court.

V. Petitioner's Claim Regarding the Use of the "Stun Belt" Does Not Warrant Habeas Relief.

A. Background

Prior to trial, the court expressed a concern about security, indicating "custodial personnel" had advised the court of "incidents involving Mr. Martinez" (R.T. 10). The court continued:

"The Court has also reviewed the Court's file and has observed that Mr. Martinez' case was the – well, it is here because of mistrial previously. The mistrial order cites Mr. Martinez' misconduct. That circumstance is amplified by a memorandum from the marshal's office that I have provided copies to counsel. It is a memorandum dated June 11, 1998 from Claudio Vela, V-E-L-A, a deputy marshal.

"These memos indicate, in substance, that there were behavioral circumstances involving Mr. Martinez which were directed at Mr. Martinez' former counsel, Mr. Congdon, and which may also have been directed at others and the fact that Mr. Martinez was restrained by way of the REACT, R-E-A-C-T, . . . belt, which is an electronic device with a remote control that is possessed by the custody officer in the courtroom, and it allows use of the belt to disable the wearer in the event that the custody officer perceives a threat to security or behavior – well, a threat which creates the risk of a security threat.

"Given that background, it is the Court's view that I must have a hearing in order to determine whether or not at this juncture in the Court's discretion, the REACT belt or other restraint methods should be taken with respect to Mr. Martinez. It is my intention to call the custody officer in this courtroom, Deputy Hammock, and also to call Sergeant . . . Waitsches [sic] . . . , based upon his presence in the June 11 time frame."

(R.T. 10-12).

Deputy Hammock testified she had observed Mr. Martinez showing "violent behavior by standing up in

Court, verbal outbreak, and saying that he is not going to take this and he's going to leave" (R.T. 13). Hammock added: "But it was not in the manner of escape leave, but to go back to the cells. He's had to be told several times to sit down." (R.T. 13). On cross-examination, Hammock admitted she had observed this behavior one time, when Petitioner was brought to court for trial following several continuances and no courtroom was available (R.T. 14). On redirect, Hammock said she had "documented" two instances in which Petitioner had "acted out" since his mistrial (R.T. 14). Hammock opined that, based upon her training and experience, Petitioner was a security risk, although she added that, "to give him benefit of the doubt, he is not constant. Part of the time, he's very – he does everything you tell him to do, and then part of the time, he acts out. So in that regard, I think he needs to be restrained I don't know [sic] which way he's going to go." (R.T. 15).

Deputy Waitschies' testimony proceeded as follows:

> "[Deputy Waitschies]: On June 11, Mr. Martinez was in trial in Department 1 in front of Judge Krug, and I was summoned to that courtroom by the bailiff, who was experiencing difficulties with Mr. Martinez' behavior. He was acting up in Court, was not listening to instructions from him, the custody officer or the judge, and was talking to witnesses and was, at one point, threatening his attorney.
>
> The one incident that I did observe, Mr. Martinez became upset with some of the testimony that was coming over, and he began saying something to the witnesses, accusing them of lying or something of that sort. And the judge admonished him not to say anything, and he continued

on and then finally had to be removed from the courtroom.

THE COURT: Any other occasions that you are familiar with regarding nonconforming behavior by Mr. Martinez?

THE WITNESS: No, just on that one day. And then he was subsequently put on the REACT belt at that time.

THE COURT: In that regard, was there any further disruptive activity once the REACT belt was applied?

THE WITNESS: He had threatened further disruptive activity. During a Marsden motion, he had threatened he would go after his attorney. And there was an occasion when he was – he continued to speak out in Court, but the REACT belt was not actually utilized because his misconduct wasn't – didn't reach that point yet that it needed to be activated."

(R.T. 16-17). Deputy Waitschies described the belt as consisting of a "power package" which was "approximately six inches by six inches, two inches wide, with an elastic belt that holds it in place," and said it was "our most unobtrusive method of restraint" (R.T. 17-18). Asked to describe Petitioner, Deputy Waitschies testified:

"With this defendant, when things don't go his way, his temper will get the best of him. He has a bad temper, and his temper was not directed at Mr. Congdon that last time [sic]. It was also directed at the witness.

So, when testimony comes off of the – of the stand that he is not happy with, he may become violent. His violence may include, if he is

> unhappy with the attorney, going after the attorney, maybe assaulting the attorney. If he is unhappy with a witness in such a small setting in this court, with the witnesses being drawn to the stand within five feet of the defendant, I would have a concern for their safety when passing him, leaving the courtroom."

(R.T. 19-20).

The record contains the "Vela" memorandum to which the court referred (Augmented Clerk's Transcript 1-4). The memorandum indicates it was written by "Claudio Vela, Deputy Marshall," to a lieutenant (Augmented Clerk's Transcript 1). The memorandum reports that, on June 10, 1998, while Petitioner was in trial in Judge Krug's courtroom, Petitioner "made two verbal outbursts in the presence of the jury" (Augmented Clerk's Transcript 1).

The court ruled Petitioner presented a "very real security risk," and ordered Petitioner to wear the belt (R.T. 21). The court informed Petitioner that "we are going to install the belt on your person so that it will not be visible to anyone," and advised Petitioner of the circumstances under which the belt could be activated and the consequences of activation (R.T. 22-23).

During voir dire, Petitioner's counsel moved to have the belt removed, on the ground that Petitioner's mother had told counsel she had overheard an unidentified female juror "talking to some of the other female jurors about the bulge in my client's back" (R.T. 29). The court denied the motion, commenting that the chances of that juror being on the jury were "less than 75 percent as we sit here right now," and that hearsay "idle speculation" did not suffice to warrant reconsideration of the court's earlier decision that

Petitioner wear the belt (R.T. 30-31). However, the court allowed Petitioner's mother to remain in the courtroom as jury selection resumed (R.T. 32). That afternoon, the court inquired whether Petitioner's mother had reported that anyone on the jury was discussing the bulge in the Petitioner's back (R.T. 34). Petitioner's counsel responded that Petitioner's mother had advised him that "the lady that brought this up has been excused and is not on the jury panel," and that there did not seem to be a problem at this point" (R.T. 34).

When the time came for Petitioner to testify, Petitioner's counsel made a motion for the belt's removal, arguing Petitioner would have to walk by the jurors, who would be able to observe the "rather large bulge in the back" (R.T. 282). Petitioner spontaneously stood up, saying he wanted to show the court the obviousness of the belt (R.T. 282). The court admonished Petitioner not to stand up in the courtroom without permission (R.T. 282). The court denied the motion, but agreed to allow the belt to be repositioned on Petitioner's left side, so that Petitioner could stand in the witness box and be sworn without permitting jurors to see the belt (R.T. 284). At no time during the trial did Petitioner's counsel contend jurors could see the belt or the "bulge." The belt never was activated during Petitioner's trial.

After the verdict, Petitioner's counsel sought the release of juror identifying information with respect to a trial juror, Juror No. 8, based upon counsel's declaration that Petitioner's mother told counsel Petitioner's mother thought Juror No. 8 was the juror she had heard make a remark about the belt during jury selection (R.T. 564-65). Recalling that Petitioner's mother previously had indicated, following jury selection, that the prospective juror

whom Petitioner's mother had heard making a comment about the belt had not been seated on Petitioner's jury, the court ruled there was no basis to release information about Juror No. 8 (R.T. 564-65, 570-71).

The Court of Appeal held the trial court did not abuse its discretion in ordering Petitioner to wear the belt, noting, *inter alia,* that Petitioner's claim the belt was visible to the jury was "meritless" (Pet. Ex. A, p. 6).

B. Discussion

The use of restraining devices can prejudice a criminal defendant in the eyes of a jury by impairing the presumption of innocence. *See Hawkins v. Comparet-Cassini,* 251 F.3d 1230, 1240 (9th Cir. 2001); *Duckett v. Godinez,* 67 F.3d 734, 747 (9th Cir. 1995), *cert. denied,* 517 U.S. 1158 (1996); *Castillo v. Stainer,* 983 F.2d 145, 149 (9th Cir. 1992), *cert. denied,* 510 U.S. 1014 (1993). Restraints may detract from the dignity and decorum of the proceeding, confuse and embarrass the defendant, cause significant discomfort or pain, or impede the defendant's ability to communicate with his or her counsel and participate in his or her defense. *Hawkins v. Comparet-Cassini,* 251 F.3d at 1240-41; *Duckett v. Godinez,* 57 F.3d at 747. However, a stun belt, "being largely invisible to the jury, avoids such prejudice, unless and until it is activated." *Hawkins v. Comparet-Cassini,* 251 F.3d at 1241-42; *see also People v. Garcia,* 56 Cal. App. 4th 1349, 1355-56, 66 Cal. Rptr. 2d 350, 353-54 (1997) (declining to apply traditional rules governing use of physical restraints where stun belt is used, because belt does not restrict movement, is not visible to jurors, does not diminish courtroom decorum, and "should not cause confusion, embarrassment or

humiliation"). Additionally, errors resulting from the use of physical restraints are subject to harmless error analysis. *See Packer v. Hill,* 2002 WL 850822, at *11 (9th Cir. 2002); *Castillo v. Stainer,* 997 F.2d at 669.

To prevail on his claim, Petitioner must show, at a minimum, that the belt was not justified by state interests and was visible to the jury. *Ghent v. Woodford,* 279 F.3d 1121, 1132 (9th Cir.), *amended on other grounds,* (9th Cir. 2002). Petitioner also must show any constitutional error had a "substantial and injurious effect" on the jury's verdict. *Id.* at 1132 & n.9; *Packer v. Hill,* 2002 WL 850822, at *11.

The use of restraints may be justified where there is evidence of disruptive courtroom behavior, assaults or attempted assaults while in custody, or "a pattern of defiant behavior toward corrections officials and judicial authorities." *Duckett v. Godinez,* 67 F.3d at 749 (citations omitted). The decision to use restraints may be based upon a defendant's conduct in prior court proceedings. *See Jones v. Meyer,* 899 F.2d 883, 885 & n.2 (9th Cir. 1990), *cert. denied,* 498 U.S. 832 (1990). Petitioner's previous misconduct during court proceedings contributed to a mistrial and led to prior use of the belt. That misconduct included threatening his attorney. Petitioner has produced no "clear and convincing" evidence to rebut the presumption of correctness that must be afforded to the trial court's determination that Petitioner presented an unacceptable security risk. *See* 28 U.S.C. § 2254(e)(1).

Moreover, Petitioner has not shown to be unreasonable the Court of Appeal's determination the jurors did not see the belt. Petitioner cites Waitschies' testimony that the belt would be visible if, Petitioner stood up (Pet. Mem., p.

21). However, there is no showing the belt or the "bulge" actually was visible to any juror. Although Petitioner's counsel said he observed a "bulge," the jury was not present at that time. When Petitioner testified, the belt was moved so the jury could not see any protrusion, much less speculate about the cause of any protrusion. If no juror observed the belt or "bulge," the jury's verdict could not have been affected by the use of the belt. *See Packer v. Hill,* 2002 WL 850822; at *11 (no prejudice where no juror recalled seeing restraints); *Castillo v. Stainer,* 983 F.2d at 149 (shackling harmless because jury could not see waist chain); *compare Rhoden v. Rowland,* 172 F.3d 633, 636-38 (9th Cir. 1999) (petitioner's shackling throughout his trial for rape and sexual assault not harmless, where several jurors saw the shackles, and at least two jurors recalled other jurors' comments about the shackles, petitioner suffered physical and emotional pain from shackles, and the main issue at trial was whether petitioner used force or fear to assault victim or whether victim consented).[18]

In the Traverse, Petitioner concedes Petitioner "cannot affirmatively establish that any of the jurors actually saw the bulge in petitioner's back" (Trav., pp. 11-12). Petitioner requests an evidentiary hearing on the ground that the court refused "to permit petitioner to obtain such affirmative evidence" because the court denied Petitioner's post-trial motion for the release of juror information (Trav., pp. 11-12). Petitioner acknowledges that Petitioner's counsel

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[18] Petitioner does not argue the wearing of the belt prejudiced Petitioner by impairing communication with his counsel or participation in the defense. *See Packer v. Hill,* 2002 WL 850822, at *11 (petitioner who alleged leg brace impeded his ability to participate in his defense failed to show such alleged impediment had any "substantial and injurious effect" upon the verdict within the meaning of *Brecht*).

subsequently contacted Juror No. 8, and one other juror, both of whom refused to talk to counsel (Trav., p. 12).

Petitioner's counsel made no attempt to make a contemporaneous record, during the trial, that the belt or "bulge" was visible to jurors. There were other individuals in the courtroom who had the opportunity to observe Petitioner, and detect the presence of the belt or "bulge," including the judge, courtroom personnel, the prosecutor, and Petitioner's counsel. Petitioner has offered no proof from any of these individuals to support his claim. In any event, even if jurors glimpsed the "bulge" as Petitioner was walking in or out of the courtroom, or standing briefly, such "brief and infrequent" observations would not have been inherently or presumptively prejudicial. *Ghent v. Woodward,* 279 F.3d at 1133. In the absence of an affirmative showing of prejudice, Petitioner's claim fails. *Id.*; *Packer v. Hill,* 2002 WL 850822, at *11.

VI. Petitioner's Claim That the Trial Court Unconstitutionally Denied Petitioner's Motion for a Mistrial After a Witness Made a Prejudicial Statement at Trial Does Not Warrant Habeas Relief.

A. Background

Lisa Calderon proved to be a hyperbolic, histrionic witness at Petitioner's trial. Asked to identify a police photograph, Calderon said: "That's the blood all over the wall and floor from my brother-in-law bleeding to death." (R.T. 205). When Petitioner's counsel asked Calderon whether Peter made any statements while he was lying on the floor, after having been shot, Calderon stated: "He was bleeding, he was in pain. He was dying." (R.T. 223-24). Of

course, the jury knew Peter did not bleed to death; Peter had been the prosecution's second witness.

Calderon also volunteered that, when she saw Petitioner standing outside, Calderon was "scared for my grandkids . . ." (R.T. 222). The evidence showed only one child was in the house at the time of the shooting. The court admonished Calderon simply to answer the question asked of her (R.T. 222). Calderon did not heed the admonishment. For example, when asked the duration of the time she heard the shots, Calderon said she did not know, and added: "I just thank God I didn't get shot." (R.T. 224). When Petitioner's counsel attempted to use Calderon's preliminary hearing testimony to impeach Calderon's trial testimony that she moved the kitchen blind to look out the window, Calderon insisted (contrary to the transcript of the preliminary hearing) she *had* testified at the preliminary hearing that she had moved the blind to look out the kitchen window (R.T. 209-15, 217-18). Calderon attributed the absence of any such statement in the preliminary hearing transcript to an error by the court reporter. *Id.*

Thereafter, and toward the end of cross-examination, the following occurred:

> "[Petitioner's counsel]: Now, you've talked about your state of mind as being very scared; is that correct? You had just woken up?
>
> A. I was frightened of the shots and the guns and the person shooting them because he's gotten away with murder before and I don't want him to get away with it again.

> [Petitioner's counsel]: Motion to strike –
>
> The Court: Miss Calderon, if you volunteer once more, you are confronting contempt in this Court.
>
> The motion is granted.
>
> Answer questions that are asked of you, nothing more. Do you understand?"

(R.T. 224-25). At sidebar, Petitioner's counsel moved for a mistrial (R.T. 225). The court denied the motion, but indicated it would admonish the jury to disregard Calderon's remark (R.T. 225). The court then told the jury:

> "Ladies and Gentlemen, once again, I caution you and order you to disregard the remarks of this witness to the effect of other circumstances ~~of murder~~ involving Mr. Martinez. There is absolutely no such evidence before you. She has been cautioned further, such inappropriate remarks will result in sanctions by this Court.
>
> But you as the jury in this matter are instructed specifically to disregard that remark, put it from your mind. It has no place in this trial, and any such assertions which are not evidentiary by any stretch are not evidence in this case, so disregard it."

(R.T. 226-27).

B. Discussion

Extraneous information that the defendant has committed a similar crime in the past can be "highly inflammatory." *See United States v. Frederick,* 78 F.3d

1370, 1375 (9th Cir. 1996) (in child molestation prosecution, government witnesses' improper testimony about defendant's prior sexual misconduct with other children not harmless); *Dickson v. Sullivan,* 849 F.2d 403, 407 (9th Cir. 1988) (courtroom deputy told two jurors defendant had "done something like this before"); *United States v. Field,* 625 F.2d 862, 872 (9th Cir. 1980) (admitting evidence of defendant's prior convictions raises the specter of "he did it before, he could do it again"). Calderon's comment, taken alone, arguably suggested petitioner was a former murderer who had tried to "do it again."

However, jury exposure to extraneous information warrants habeas relief only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *See Lawson v. Borg,* 60 F.3d at 612 (applying *Brecht* standard to claim jurors received extrinsic information concerning petitioner's violent personality). Even where jurors receive extrinsic information adverse to the defendant, "[v]arious factors might nonetheless suggest that the potential prejudice of the extrinsic information was diminished in a particular case and therefore that the extrinsic evidence did not substantially and injuriously affect the verdict." *Jeffries v. Wood,* 114 F.3d at 1491. "The nature of the test for prejudice [set forth in *Brecht*] precludes categorical reversal, or affirmance, for introduction of extraneous information." *Thompson v. Borg,* 74 F.3d 1571, 1575 (9th Cir.), *cert. denied,* 519 U.S. 889 (1996). The court may consider the relative clarity or ambiguity of the comment, whether it was unsolicited, whether the information was otherwise admissible or cumulative, the effect of any curative instruction, the trial context, and the weight of the evidence against the defendant. *Jeffries v. Wood,* 114 F.3d at 1491-92 (footnotes omitted); *see also*

United States v. Mills, 280 F.3d 915, 922 & n.2 (9th Cir. 2002).

Considering the entirety of Calderon's testimony, the comment was not nearly so prejudicial as it first might appear in isolation. Calderon's testimony prior to the challenged statement showed her to be emotional, antagonistic towards Petitioner, prone to exaggerate, and willing to inject gratuitous comments designed to appeal to the jury's sympathy. Even the challenged statement itself was transparent hyperbole: no one had murdered Peter or Robert; Petitioner was not on trial for murder. Considered in context, Calderon's statement that Petitioner had "got away with murder before" appears (and doubtlessly would have appeared to the jury) less a factual statement than a penultimate, hyperbolic comment leveled against Petitioner by an emotional and biased witness. *See Whitehead v. Cowan,* 263 F.3d 708, 723-25 (7th Cir. 2001), *cert. denied,* 122 S. Ct. 927 (2002) (no prejudice where, in jury's presence, victim's mother rose from her seat on the witness stand and began crying and shouting at petitioner, asking why he had killed her daughter; court instructed jury to disregard statements and evidence of petitioner's guilt was overwhelming; noting that "[a]ny juror would expect that a close relative of the victim would have strong emotions towards the suspected killer"); *Brown v. Henry,* 1999 WL 521180, at *9 (N.D. Cal. 1999) (where victim's mother stated to defendant, as she left the stand, "I don't forget your face," then sobbed and yelled in hallway outside courtroom, any error harmless; court gave limiting instructions and evidence pointed to petitioner as the perpetrator), *aff'd,* 9 Fed. Appx. 719, 2001 WL 569157 (9th Cir. 2001) (unpublished disposition). The fact that Petitioner had been gesturing

at Calderon during her testimony, and, according to the prosecutor, smirking and smiling at her (*see* R.T. 206, 230-31), further supports the conclusion that, in context, observers likely would conclude Calderon's statement was an emotional reaction meriting little credence.

Calderon was the last prosecution witness. The jury already had heard Peter's identification of Petitioner as the gunman, and Karen's identification of Petitioner by his voice. *Compare Mach v. Stewart,* 137 F.3d 630, 633-34 (9th Cir. 1997) (where, during voir dire in prosecution for sexual conduct with a minor, prospective juror who was a children's social worker stated she had never known a child to lie about sexual abuse, error was not harmless; because comments occurred prior to trial they tainted the entire jury from the outset, and bulk of prosecution's case consisted of testimony of minor victim).[19]

Moreover, unlike cases in which a curative instruction is impossible because the jury's receipt of prejudicial information was not discovered until the trial had concluded,[20] the court immediately instructed the jurors that

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[19] Notably, the jury learned during trial that Petitioner previously had committed the violent crime of an assault with a deadly weapon (R.T. 300, 314-15).

[20] *See, e.g., United States v. Keating,* 147 F.3d 895, 903-04 (9th Cir. 1998) (under federal standard of review on appeal, defendant entitled to new trial where, after court had excluded evidence of defendant's prior state conviction for same conduct that was the subject of federal prosecution; juror obtained information about defendant's state conviction and shared it with other jurors, who discussed the matter; court was unaware of problem and hence, could give no curative instruction; and evidence against defendant was not overwhelming); *Jeffries v. Wood,* 114 F.3d at 1491-92 (jury misconduct prejudicial where one juror informed other jurors petitioner was a convicted armed robber, the only aggravating circumstance warranting death penalty

(Continued on following page)

Calderon's comment was inappropriate and not evidence, and that they were to disregard it and put it from their minds. Courts "normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." *Greer v. Miller,* 483 U.S. 756, 766 n.8 (1987); *see also United States v. Parks,* 285 F.3d 1133, 1141 (9th Cir. 2002) (although jury "would likely infer from [challenged] statement" that defendant charged with bank robbery "had committed bank robberies in the past," trial judge's admonishment to the jury to disregard the statement rendered the statement harmless); *United States v. Mills,* 280 F.3d at 922 ("a timely instruction from the judge usually cures the prejudicial impact of evidence unless it is highly prejudicial or the instruction is clearly inadequate"; citations and internal quotations omitted).

Petitioner's assertion that the curative instruction inappropriately referenced Calderon's statement lacks merit. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 644 (1974) (prosecutor's inappropriate comment in closing argument not prejudicial where, *inter alia*, judge "took

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was alleged robbery, and there was no opportunity for a limiting instruction because misconduct was disclosed two years after petitioner's sentencing); *Lawson v. Borg,* 60 F.3d at 610-13 (jury misconduct prejudicial where it was disclosed after trial that one juror told others petitioner had violent reputation, and proof of intent to commit robbery was pivotal to establishing alleged attempted robbery special circumstance); *Dickson v. Sullivan,* 849 F.2d at 408 (where information that courtroom deputy had told jurors defendant had "done something like this before" was discovered two days after the verdict, court's general instructions at trial limiting the use of evidence of prior convictions insufficient to ensure deputy's comment was harmless, applying pre-*Brecht* standard of review).

special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case"; judge emphasized that prosecutor's statement was not evidence, "*directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it*"; emphasis added; footnote omitted); *United States v. Nelson,* 137 F.3d 1094, 1105-06 (9th Cir. 1998), *cert. denied,* 525 U.S. 901 (1998) (where, after government witness admitted she was guilty of robbery, prosecutor stated "[j]ust like the defendants on trial are guilty," prosecutor's misconduct not prejudicial where court not only instructed jury to disregard the question, but also polled jurors individually to determine whether each juror thought the question was inappropriate and would disregard it); *United States v. Restrepo,* 884 F.2d 1294, 1296-97 (9th Cir. 1989) (rejecting argument that limiting instruction unduly emphasized evidence of defendant's prior bad acts). Although Petitioner asserts the curative instruction was deficient because the court never said Calderon's statement was untrue (Pet. Mem., p. 30), Petitioner does not contend the trial judge could have known the truth or falsity of an allegation Petitioner had "gotten away with murder before." In any event, the court was not required to do any more than what it did. Instructing the jury that the statement was not evidence and that the jury should disregard the statement sufficed. *See United States v. Cordova,* 537 F.2d 1073, 1076 & n.3 (9th Cir.), *cert. denied,* 429 U.S. 960 (1976) (witness' testimony concerning defendant's past criminal activity did not warrant mistrial, where court instructed the jury that "anything that has to do with any inference that might be alluded to, of any other type of involvement against the law, you are to exclude that completely. We are not concerned with anything else, other than this particular

charge here and there is no evidence of any other crimes having been committed. . . . ").

Finally, the fact the jury requested readbacks of the testimony of Peter, Robert and the "arresting officer" (*see* C.T. 97-98) further supports the conclusion the jury did not convict Petitioner because of Calderon's comment, but rather convicted him on the properly received evidence before it. *See Thompson v. Borg,* 74 F.3d at 1576 (court "confident" that jury did not convict on basis of prospective juror's statement during voir dire that he read petitioner had "pleaded guilty and, then changed it," because, among other things, deliberating jury asked judge "serious questions" about self-defense). In light of the strength of the evidence of Petitioner's guilt, including Peter's identifications of Petitioner as the shooter immediately after the shooting, at the hospital, and at trial, and Karen's identification of Petitioner's voice, and considering Petitioner's flawed and unconvincing defense, Calderon's palpably exaggerated, intemperate remark did not render Petitioner's trial fundamentally unfair, or have a "substantial or injurious effect" upon the jury's verdict. *See Thompson v. Borg*, 74 F.3d 1571, 1575-76 (9th Cir. 1996) (no prejudice where prospective juror's statement that petitioner "pleaded guilty and then changed it" was unclear, trial judge gave careful curative instruction, and jury deliberated over two days and sent questions to the judge; "[t]he case is analogous to where a witness says something that was not supposed to be before the jury, the judge admonishes the jury to disregard it, and there is no reason to doubt that the jury obeyed the admonition"); *United States v. Arias-Villanueva,* 998 F.2d 1491, 1502 (9th Cir. 1993), *cert. denied,* 510 U.S. 937 (1993) *and* 510 U.S. 1001 (1993)

(witness' testimony that she was "just as guilty as everyone else in this room" did not warrant mistrial, where court gave prompt limiting instruction and evidence against defendants was "substantial enough to insure that even if admission of [witness'] testimony was error, the error was nonetheless harmless"; citations omitted); *United States v. Aichele,* 941 F.2d 761, 765 (9th Cir. 1991) (witness' revelation of defendant's prior incarceration deemed harmless, where court gave prompt curative instruction and evidence against defendant was strong).

VII. No Cumulative Error Exists Warranting Habeas Relief.

As discussed above, all of Petitioner's trial error claims fail. Petitioner's cumulative error claim also fails. *See Rupe v. Wood,* 93 F.3d 1434, 1445 (9th Cir. 1996), *cert. denied,* 519 U.S. 1142 (1997); *see also Turner v. Calderon,* 281 F.3d at F.3d 890 ("Cumulatively, Turner's claims of alleged trial error create no more prejudice than they do independently.").

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2)

directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: May 17, 2002.

/s/ Charles Eick
CHARLES F. EICK
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DARRICK MARTINEZ, Petitioner, v. ROSIE GARCIA, Warden, Respondent.	NO. ED CV 01-766-GHK(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (Filed Aug. 7, 2002) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge [Having conducted a de novo review of the [illegible] to which petitioner has objected, /s/ GHK] the Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petition and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 8/7, 2002.

/s/ George H. King
GEORGE H. KING
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DARRICK MARTINEZ, Petitioner, v. ROSIE GARCIA, Warden, Respondent.	NO. ED CV 01-766-GHK(E) JUDGMENT (Filed Aug. 7, 2002) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: 8/7, 2002.

/s/ _____
GEORGE H. KING
UNITED STATES
DISTRICT JUDGE